

REMARKS

ON

Mr. Higden's
UTOPIAN CONSTITUTION;

OR, AN

ANSWER

TO HIS

Unanswerable BOOK.

 By an *ENGLISH-MAN*.

 With an APPENDIX.

We are either bound to obey the Sovereign by some Obligation that the Law of GOD brings on us, or we are not ; if not, then all Sacredness of Authority is gone, the Prince hath nothing but FORCE to maintain his Right, and every USURPER, that masters him, shall have a better Right, by how much more Power he has to strengthen his ambitious Pretensions. Dr. Burnet's Sermon, Rom. 13. 5. p. 17, If a Man vow a Vow unto the Lord, or swear an Oath to bind his Soul with a Bond, he shall not break his Word, he shall do according to all that proceeds out of his Mouth. Num. 30. 20.

L O N D O N;

Printed, and Sold by the Bookfellers of *Westminster and London.* (Price Bd. 2s. 6d.)

1608/4892



PREFACE.

I HAVE little or nothing to say by way of Preface, but only to tell the Reader how I came to make these Remarks; and to give him some short Account of them. As soon as I heard, that Mr. H. had Publish'd his View, I procur'd it, and read it over, and when that was done, I e'en laid it aside, as having, as I thought, nothing new in it. But hearing, where-ever I came, that it was a shrew'd Piece, and applauded by Men of deep Reach and profound Judgment, and such as made a Figure in their several Professions; I resolv'd to take it up again, and read it over more carefully, and, as I read, to make some Remarks upon it, and to answer whatever look'd like an Argument, for my own Satisfaction, which I did accordingly; And then shew'd them

P R E F A C E.

to a particular Friend, whom I knew to be a good Judge of things of this Nature: He having perus'd and approv'd them, advis'd me to fortify, what I had thus writ off hand, with Authorities of some of our Ancient English and Latin Historians, and old Statutes, and then make them Publick: But this I was very unwilling to do, because I saw it would create me a great deal of trouble, and put me to the drudgery of transcribing the whole. To avoid this, I took up a Resolution to collect and lay together some Passages of Law and History, applicable to the Subject in hand, and print them by way of Appendix, that the Reader seeing the Authorities all together, might be able to make the better Judgment of the Opinions of our Fore-fathers, as to the Pretensions of Mr. H's Kings de facto.

I might, I confess, have said a great deal more, and some perhaps will not be pleas'd that I have not, but I cannot help that;

P R E F A C E.

that ; I think I have said enough to shew that our Constitution is misrepresented by Mr. H. throughout his whole Book, which is as much as is needful.

I might have said, that tho' Bishop Merks as Mr. H. says, pleaded Henry IV's Pardon, yet he did not thereby own his Right, any more than those Loyal Gentlemen in Cromwell's Time, who pleaded his Pardon, or sought for it, own'd, or believ'd him to be King de jure. I might have said that some Acts made even by Kings de jure (as some made by Hen. VIII. a King de jure and his Parliaments) were never repeal'd, and yet no more notice taken of 'em in following Reigns, than if they had never been made, being against the English Constitution ; and that Mr. H. knew this well enough, but wisely took no notice of it, because it would have spoil'd his Hypothesis. I might——

I have at the end of the Remarks, added some Queries, which may be of use, and give light to some Passages in the Book,
but

P R E F A C E.

but I am aware that it will be said by some captious Readers, that I forget my self, because I propose some things by way of Queries, that were urg'd in the Remarks as Arguments, to prove that there were anciently such People as we now call Non-Jurors, &c. but I can assure them there is no such Matter. I did not forget my self, but did it designedly, and for Reasons best known to my self. If any have a mind to guess at my Reasons they may, they have their Liberty, perhaps it may do them good. I am resolv'd I'll give them none, unless they can show me Statute or Common Law for it.

I have likewise in the Appendix printed so much of that part of Mr. Prinn's Plea for the Lords, as is to my purpose, (and often referred to in the Remarks), for two Reasons : First, Because what he says will serve for an Answer to the most Material Parts of Mr. H's View. And, Secondly, Because every one cannot procure the Book.

P R E F A C E.

I should have taken notice in the Remarks, That the People, as well as the Pope and his Clergy, were ready at all times to own Usurpers, and submit to 'em as de jure, and for the same Reason too, i. e. Interest. For they, as well as the Popish Clergy did expect to have such Laws made in their favour by de facto Kings, as Kings de jure, they knew, would not easily grant, being generally to the Disadvantage of the Crown. Dr. Brady in his History of the Succession, p. 373. says, That the Barons, or Major Part of them, always bargain'd and made Terms with Usurpers to their own Advantage, and Disadvantage of the Crown. And my Lord Bacon, in his History of Henry VII p. 3. says, of Richard III's Laws (and it holds true of most of the Laws made by de facto Kings) That as for Politick and wholesome Laws, which were enacted in his Time, they were but the Brocage of an Usurper,

P R E F A C E.

Usurper, thereby to woove and win the Hearts of the People, as being Conscious to himself, That the true Obligations of Sovereignty in him fail'd and were wanting. And hence probably came that Villainous Mob Aphorism, That is so much applauded by Persons ill affected to Hereditary Monarchy, viz. That he that hath the worst Title, makes the best King.

And now if any Reader do not like the Answer, I have here given, let him e'en make a better, and I dare assure him that in so doing, he will oblige all True ENGLISH-MEN, and particularly



A. B.

R E.

REMARKS

ON

Mr. *Higden's*

UTOPIAN Constitution, &c.

A. **S**IR, You are well met. You are the
the very Person I have been hunting
after for some Days.

B. Why ! What's the Matter ?
What extraordinary Business can you have with
me ?

A. Troth, my Business is not very extraor-
dinary. I only want your Opinion of Mr. *H's*
Book, which makes such a mighty noise about
Town. I have seen it, and read it cursorily
over.

B. So have I, and that's all ; I have it in
my Pocket ; and, if you'll go with me to *N's*
Coffee-House, we'll read it over again together.

A. With all my Heart : 'Tis not very
long.

B

B. No.

B. No. But some say there's a great deal in it, and that it is *unanswerable*. He hath taken a *full View*, and said more than any one upon the Subject of our *English Constitution*. He hath outdone the *Lawyers* themselves.

A. Say you so ! Pray let us go into a private Room, and make some *Remarks* upon it.

B. With all my heart.

A. The Title runs thus, *A View of the English Constitution, with Respect, &c.*

B. Well ! Let it be *View* or *Review*, I will not trouble my Head about that ; because *Booksellers* pretend a *de facto* Right, to give Titles to Books ; and the Title may be the *Booksellers*, and not the *Authors*. The *Booksellers* have a Title-Club in ———

A. Be it so, I begin with the *Book*. He says, *Chap. i. p. 1.* “ I shall first consider the “ Authority of the King, *for the Time being, &c.*

B. *King for the Time being* ! What does he mean by that ? In our Acts of Parliament, and in our common Discourse, when we speak of an Officer or Magistrate *for the Time being*, we always mean one that is so *according to Law*, as My Lord Mayor, for the Time being, the Sheriff for the Time being ; that is, my Lord Mayor or Sheriff chosen according to Custom, and the City-Charter. And if, *by time being*, he means so, where is the mighty Discovery ? Every Body knows this, as well as Mr. H.

A.



A. That's true. But by *King for the time being*, Mr. H. means one that is in *Possession right or wrong*. For he says, Allegiance is due to a King *de facto*, or in *Possession*, and to him ONLY.

B. Bate me an Ace, quoth Bolton. Certainly, if this be his meaning, he used the wrong End of his Perspective, when he took his *View* of our *English Constitution*; for our Laws require Allegiance *only* to Kings *de jure*, whether in, or out of *Possession*.

A. But he'll demonstrate to the contrary, both from *Common* and *Statute Law*.

B. If he can do that, he'll do more than any of our *Common Lawyers* ever did, or could do; and that's a bold Word, my Friend.

A. *Common Law is common Custom and Usage*, p. 1.

B. Be it so. Then I say, Allegiance is not due to a King *de facto* ONLY, by *Common Law*; for pray what *Common Law*, or *Custom* had the first King *de facto* to plead? Could he plead *Custom*, before there was any such thing? This would be absurd in the first *de facto*, whatever it were in others; and to this Mr. H. seems to agree, p. 25. when he says, *Immemorial Custom is not of force till after a long Tract of Time*.

A. Common Custom and Usage is so evidently on the Side of the Regnant King, that the People of *England* always submitted, and took Oaths of Fidelity to the 13 Kings, who from the Conquest to *Henry VII.* came to the Throne without *Hereditary* Titles, as well as the Six *Hereditary* Kings, who reign'd in that Period.

B. We'll grant all this, and yet the People of *England* might take Oaths of Fidelity to 'em, as coming to the Throne with an *Hereditary Title*, for all that. For *most*, if not *all*, those that came to the Throne by *Usurpation*, claimed as *Heirs* or *Conquerors*, or both, as *William* the *Conqueror*, and always declared that they held the Crown by *Title of Blood*, and as such their *Parliaments* recogniz'd 'em, and the *People* swore to 'em. In short, they were Kings *de facto*, and *Usurpers*, but Allegiance was paid them as pretended *Heirs* to the Crown; and had Mr. *H.* liv'd in any of those *pretensed* Kings Reigns, and told the *Usurper*, or King *de facto*, or what else Mr. *H.* pleases to call him; that Allegiance was due to him, not upon the Account of his *Hereditary Title*, but merely on the account of his *Possession*, without any previous Claim, he would have been seiz'd and apprehended as a *Traitor*, and the Judges, notwithstanding Mr. *H.*'s *Common Custom*, would have made no scruple at all of con-

condemning him, to be drawn, hang'd and quarter'd as a Traitor.

Büt to instance in one of Mr. *H's* 13 *de facto* Kings, viz. Henry IV. who, as Mr. *H.* owns, had no *Hereditary Title*, yet he claim'd the Crown as if he had; for he claim'd the Crown, and challeng'd the Realm, as descended from Henry III. Take the Claim in his own words, and English.

In the Name of Fader, Sonne, and Holy Ghost; I Henry of Lancaster, challenge the Rewme of Englonde, and the Crowne, with all the Membres and the Appurtenances, als descendit be ryght lyne of the blode comeynge from the gude Lord Henry therde, and through that ryghte that God of his Grace hath sent me, with help of my frends, to recover it; the which Rewme was in point to be undone for default of Gobernance, and undoing of the gude Laws. Knighton inter 10. Script. p. 2757.

Post quam quidem vendicationem, & clameum tam Domini Spirituales quam Temporales, & omnes Status ibidem presentes singillatim & communiter interrogati quid de illa vendicatione & Clameo sentiebant, iidem Status, cum toto populo, absq; quacunque difficultate; ut
Dux

Dux præfatus super eos regnaret, unanimiter consenserunt.

All the Usurpers, (*Oliver* excepted) claim'd the Crown as their Right by *Inheritance*, and as being of the *Blood Royal*; and tho' they knew very well, that another had a *better Title*, they made their Parliaments recognize them as *Heirs*; and of this Mr. H. cannot be ignorant. How then can he make *Possession*, or *de facto*-ship ONLY to be the *English Constitution*?

Is not *England* an *Hereditary Monarchy*? And does not Mr. H. own it in this very Page? How then can he say, That Allegiance is due ONLY on account of *Possession*? He knows it, and I appeal to him for the Truth of it, That all our *de facto* Kings (knowing this to be an *Hereditary Monarchy*) always labour'd to make out an *Hereditary Title*, which they needed not to have done, if *Possession* alone had been the *English Constitution*. They needed only have said, as Mr. H. does, The *Constitution* of *England* gives the Crown to him that can get it; I have got it, and therefore have a *Constitution Right*, and will keep it. But they were wiser.

In an *Hereditary Monarchy*, the Crown descends to the next *Heir* in *Blood*; but if the *Heir* has no *Right*, because he cannot get *Possession*,

session, what good does his *Right* do him? *Lineal Descents*, at this rate, are very uncertain Things; and an Heir had better be without them, if he can receive no Benefit by 'em. At best 'tis to have an *Heritable Right* without an *Inheritance*, which is such a Right, as I believe no Lawyer ever dream't of, and no Prince would ever think it worth his while to contend for. *Appen. N^o 1, 10, 11, 12, 13, 14, 16, 18.*

If this Notion of Mr. *H's* be allow'd to be good, I will venture to say, that our Constitution is not only the most ridiculous, but most unrighteous and pernicious Constitution that was ever yet in the World. For if there be no certainty to whom the Crown belongs by *Right of Inheritance*, the Sword must always be drawn, and a Standing Army must always be kept up to support the *Possessor*; and those that have a Right by Descent, *must* (to use Mr. *H's* Phrase) *cut their Way to the Throne with the Sword*; and so, instead of a righteous Succession of *Inheritance*, it will prove a *Succession of Blood-shed and Confusion*. For if *mere Possession*, which gives no Right to another Man's Estate, give a Right to the Crown, what shall hinder any ambitious Prince, who has Party big enough to stand by him, to dispossess a *Regnant King or Queen*, or to keep the right Heir out of Possession? Nothing, as

I can see. The Crown at this rate, is a *Prize*, which must be set up, and fought for, and he that gets it, may keep it as long he can ; and if the righteous Possessor be dispossest'd, he must submit to him that is stronger, and swear Fidelity to him too ; for where there can be but one Rightful King, (as in *England*) all that are not Kings in *Possession*, if they tarry in *England*, must swear, or dye for it. O, Blessed Constitution ! How happy must such a Prince be, whose Title is so precarious ! And how happy the Subject, that knows not to whom his Allegiance is due, but must swear to the *Possessor*, right or wrong, whether a *Cade*, *Tyler*, or *Cromwell* ! And yet Mr. H. owns this Kingdom, forsooth ! (any thing to the contrary notwithstanding) to be an *Hereditary Kingdom*. O the Power of this single Word *Custom* ! It can make Contradictions true, which old *Aristotle*, with all his Philosophy, could never do ; it can make the same Kingdom, at the same time *Hereditary* and *not Hereditary*. My Friend, what must we do in this Case ? The Constitution, for certain, requires us to pay our Allegiance to the King *de jure*, or the *Hereditary* King, but in comes Mr. H. with his old *Customs*, and musty *Tear-Books*, and says, we must pay our Allegiance to the *Possessor*, tho' he be King only *de facto*. For my Part, to speak my Mind freely, I think
we

we ought to stand by the *Hereditary Constitution*, for that was long before *Custom*, and is much older, even as old as the *English Monarchy* it self.

The old sage Politicians were wont to divide Monarchy into *Hereditary* and *Elective*, but they never once thought of Mr. *H*'s Monarchy, by *Usurpation*; this is purely his own Invention, let him have the Honour of it; and such as no Prince under the Sun will allow of, unless he is mad, and weary of his Kingdom and Life too; and no People in the whole World were ever so frantick, as to call an Usurper a *Rightful King*, or to say he had an *Usurpation-Right*.

But to go one Step further, will Mr. *H*. stand by it, that what is gain'd *unjustly*, and kept by *force*, does, by the *Common-Law*, of this Kingdom, become a just Possession? If he will, he must, if there were such an unrighteous Custom, own, That a *Son* or *Servant*, having got *Possession* of his Father's, or Master's Estate, has a Good and Legal Right to it: Or a House-breaker, or High-way-man, having taken away Mr. *H*'s Goods, or Purse, by his own way of arguing, has a *Right* to them, having the *Possession* of them. And if he will not stand to this, I desire one wise Reason from him, or any of *his* Lawyers, why the Case of a *Rightful King* must be harder than

than that of his Subjects. Or how the Estate of the Crown, which of all others is the greatest, can be, contrary to the Laws of Natural Justice, and God's Commands, subject to such Tyrannical Custom, more than the Estates of private Men? Let Mr. *H.* seriously consider of these Things, and tell us what the End of such an ungodly Principle must be. Theft is Theft, and Injustice is Injustice, in great as well as small Matters, nay, much greater; and therefore if it be no Robbery to take a *Crown*, 'twill be none to take a *Purse*, or steal a *Sheep*. And I hope Mr. *H.* will use his Interest to get an Act of *Convocation*, to take away the 8th and 10th Commandment, and an Act of *Parliament* to repeal the Acts against *Felony*, and get likewise that old Rule cancell'd, of *Doing as we would be done by*, which relates to Crowns, as well as all other things. This would be a short Way. But till these Things are done, and as long as the 8th and 10th Commandment keep their Places in the Decalogue, and our Laws stand unrepeal'd against *Felony*, and unjust taking and detaining other Mens Goods, the unjust Possessor can never have a Right to what he has *unjustly* gotten, but must part with it. The Law of God requires Restitution of all that's ill gotten, and without it there is no Remission of Sins to *Prince* or *Subject*. God is no Respector of Persons,

Persons, He will render to every one according to his Works: And Sir *Edward Coke's* Authority, and the Authority of *Year-Books*, which are of no force against the *Common Laws* of GOD, and *Nature*, will not serve the Turn at the Great Day: The Usurper then (and all his Partizans) shall be punish'd for his Usurpation, tho' we give him the soft Title of a King, *for the Time being*, and the Subjects for violating their Natural and sworn Allegiance to their Lawful Prince, *tho' out of Possession*. If I should now ask Mr. *H.* whether the *French King*, taking whole Countries from Lawful Princes, without the help of their Rebellious Subjects, or *Philip V.* who hath now been nine Years possess'd of the Kingdom of *Spain*, are Lawful Possessors of those Countries, what could he answer? If he says they are not, he destroys his own Hypothesis, That ONLY *Possession gives Right*; if he says they are, he makes the Wars unjust on the Part of the Confederates; for what have they any more to do, to dispossess the *French* and *Spanish* Kings of their Right, than they had to usurp upon, or dispossess others? They having Mr. *H's* Right, *Possession*, which is a *Supersedeas* to all other Titles and Claims, and is more than eleven Points of the Law.

After

After all, if Possession gives Right, all Kings and Queens are in a miserable Condition, much worse than their meanest Subjects ; and the best Princes in the worst Condition of all. For Rebels, who are the worst of Men, if our Homilies say true, will be sure to do all the mischief they can to good Princes, because they are good, and punish them for their Crimes. And they that advance this wicked and ungodly Notion, whatever their *Pretences* may be, are the most wretched of Casuists, and the greatest Enemies, not only to *Hereditary* but *Elective* Monarchy ; for they expose the *Possessor*, let his Title be what it will.

Oaths of Allegiance were design'd and imposed for the Security of Rightful Kings ; but if Subjects can absolve themselves from their Oaths, as soon as an Usurper gets into the Throne, what Benefit has the Rightful King by such Oaths ? Just none at all ; he had as good, nay better be without them, for they are but a Snare to him. For when he thinks himself secure by their Oaths, he finds himself wofully mistaken ; they intended not to be bound by them, they swore not for *his*, but their *own* Security and Advantage. No King, no, not a King *de facto* himself, can think such slippery Sparks good Subjects. Nay, they are the worst and most dangerous Enemies, because they are *pretended* Friends.

'Tis

'Tis well known, that Mr. *H.* was once a *Non-Juror*, and now after 20 Years Consideration, and advising with *Lawyers* and *Tear-Books*, has taken the Oaths ; but I am very confident, that all who are Friends to the present Government, had much rather he had still continu'd a *Non-Juror*, than that he should come in upon such a vile and destructive Principle, a Principle that destroys all Security to Princes, by taking off all antecedent Obligations of Oaths, tho' never so solemnly taken ; resolves all Right into *Possession*, though never so unjustly acquir'd, and keeps all Regnant Princes constantly upon their Guard, though never so Just. Such Latitudinarian Subjects, are subject, neither for *Wrath* nor *Conscience* Sake, but purely for *filthy Lucre* and *sordid Interest*, who never consider what is *just* and *honest*, but what is *profitable* to themselves.

By this dangerous Principle, *That Possession only gives Right*, all Princes, *good* and *bad*, *gentle* and *froward*, are not only in Jeopardy every Hour of losing their *Crowns*, but their *Lives* too : For Usurpers don't use to be satisfy'd with the *Crown*, unless they can secure the *Persons* of the Dethroned ; and if they get them once in their Power, the Examples of *Edward II.* *Richard II.* and King *Charles I.* will satisfy all Mankind what their End is like to be, *viz.* certain Death ; for the *Royal*
Martyr

Martyr observed, and by sad Experience found it true, That there are few Steps between the Prisons and Graves of Princes.

A. Well ! Have you done with your Remarks ?

B. Yes, for the present.

A. Mr. H. says, pag. 2. he knows of no *Non-furors* in all those [13] Reigns.

B. Tho' Mr. H. knows of none, perhaps others may ; but suppose we should be so obliging to grant, that there were none ; what would he infer ?

A. Why then he would infer, that Oaths were generally taken to *Kings de facto*.

B. Will he so ? Why then I answer, *First*, That what he asserts is not true ; for most, if not all those which Mr. H. reckons *de facto* Kings, claimed, and reigned *sub ratione juris*, and therefore Oaths were taken to them, as *Kings de jure*, and never as *de facto*. *Secondly*, I answer, that those were *Popish* Times, in which the *Pope* with his *Popish* Clergy, had a very great stroak in pulling down and setting up of *Kings*, and was in a manner the sole Arbitrator between contending Princes, and had, or at least pretended to have, a Power of Absolving Subjects from their Oaths of Allegiance ; and no wonder if Subjects, misled by the *Pope* and his Clergy, paid their Allegiance where they directed them, and
fided

that was generally to the *Usurper*, for they sided with him upon Politick Considerations, because by so doing, they gain'd such Advantages to their Church, which they had reason to believe, a Lawful King would never grant them. This Mr. *H.* knows to be true, both from our own and other Historians. Dr. *Burnet* says, That *Hen. IV.* in Gratitude to the Clergy that assisted him, &c. granted them a Law to their Hearts content. *Hist. Ref. V. 1. p. 25.* Besides, *Thirdly*, There were oftentimes Disputes about Titles, of which the Populace were not competent Judges, and in such Cases the *Possessor* was sworn to, as Rightful ; and it was but reasonable, if the *Right Heir* could not be discovered, or his Title clear'd to the Satisfaction of the Subjects, who were to swear to him, for in this Case, *melior est conditio Possidentis*. But, *Lastly*, How does Mr. *H.* know there were no *Non-Furors* in *William II.* Time, or afterwards ? What *Ingulphus* says, does not prove it. *Ingulphus*, indeed says, That He [*William I.*] commanded every Inhabitant in *England* to do him Homage, at *London*, &c. but it does not follow that all obey'd, and came thither ; or that the Oaths were as *strictly, exactly, and universally* tender'd as the Lands describ'd in *Doomes-Day-Book* ; this is only a flourish and Rhetorical Rant of Mr. *H.*'s, but no Proof. Usurpers when they had
got

got the Barons and great Men on their Sides (who till *Henry VII.* Time bore a great sway, and because they held their Lands from the Crown, were ready to take Oaths at all turns of State to save what they had got) valued not little Men, who, without the Great One's, could do them no harm. And they might be *Non-Furors* too, and yet no notice taken of them : Were there no Worshippers of the true God in *Israel*, when *Elijah* said, that he alone was left ? 1 *Kings* 19. 10. But the Case is *now* alter'd, and the Commons of *England* are no such little Folk as they were *then*, neither do they depend so much on the Great Lords, and therefore Oaths have been more strictly requir'd from them than formerly. But let us suppose they were requir'd as strictly *then* as *now* ; yet considering the Power of the Pope (as abovesaid) and our Usurpers having his Approbation and Confirmation, they in Obedience to his *Holyness*, swore, as 'tis probable, without more ado : For what better warrant could they desire, than *Infallibility* it self. Add to this, That (the Right Heir being over-power'd by the Usurper and his Party, and not in a Condition to set up his Claim, without ruining himself and his Friends) they were more excusable in swearing Allegiance to the *Possessor*, because, the Heir not claiming, they might perhaps presume that he waved his Right
pro

Pro tempore, and left them at liberty to swear, to secure themselves, till he could, by his Friends and Allies, recover it, and get out of Durefs.

Now supposing, but not granting, that there were no *Non-Jurors*, I have said enough to excuse the Swearers in those times of Popery from Perjury, who swore to the Possessors, but will this excuse *Church of England Men* since the *Reformation*, who have always condemn'd that Popish Tenet, *That the Pope can absolve Subjects from their Oaths of Allegiance?* I trow not.

But what if it appear that there have been *Non-Jurors* formerly, what will Mr. H. say then? *Thomas Merx*, Bishop of *Carlisle*, tho' he sat in *Henry IVh's* first Parliament, yet it does not appear that he ever took any Oath to him, neither does Mr. H. pretend he did, but flurs it off, with *sitting in Parliament*, and *pleading his Pardon for a Conspiracy against him*. If we may make a Conjecture by his Speech in Sir *John Hayward's* History of *Henry the IV*, p. 100, he never did. The same may be said for *Richard Scroop*, Arch-Bishop of *York*. He in his Declaration, *Fox, Vol. I. p. 676. Art. I.* has these Words; " In the Name of God Amen. Before the Lord Jesus Christ, &c. We A. B. C. D. not long since became bound by Oath, upon the

C

" Sacred

“ Sacred Evangelical Book, unto our Sove-
 “ reign Lord *Richard*, late King of *England*
 “ and *France*, in the presence of many Pre-
 “ lates, &c. That we so long as we liv’d,
 “ should bear true Allegiance and Fidelity to-
 “ ward *him* and his *Heirs* succeeding him in
 “ the Kingdom by *just Title, Right and Line*,
 “ according to the *Statutes and Customs* of this
 “ Realm of *England*, by Vertue whereof we
 “ are bound, &c. upon pain of *Perjury*,
 “ which pain is Everlasting Damnation.”

Would the Arch-Bishop have thus lain before
 the People the heinousness of Perjury and Vio-
 lation of Oaths to K. *Richard*, if he had sworn
 to K. *Henry*? If he had done so, he had been
 self-condemn’d. And as he in all probability
 was a *Non-Juror*, so doubtless were most of
 his Party; for it would have argu’d great
 Weakness in him, to impart his great Design
 of restoring K. *Richard*, against *Henry* the IV.
 in *Possession*, unless his Partizans had been
 Men of the same Principles with himself; that
 is, either *Non-Jurors*, or *True Penitents*, for
 violating their Oaths to their *Rightful Prince*,
 and taking new Ones to the *Usurper* without
 Right.

Lastly, Let us suppose *Robert E.* of *Gloucester*,
Odo Bishop of *Baieux*, *Merx* Bishop of
Carlisle, and other great Men, to have taken
 an Oath of Fidelity to *Usurpers*; yet, they
 repenting

repenting their rash and unadvised Oaths, and returning to their Allegiance, as a Test of their Repentance, ought to be look'd upon as *Non-Jurors*. I believe Mr. H. himself, should he repent of what he has now done, would think he had a Right to be accounted a *Non-Juror*. And why then should not these great Men, being penitent, be allow'd to be *Non-Jurors* as well as himself? I hope he will not deny Men leave to repent. But if Mr. H. will not allow Penitents to be *Non-Jurors*, 'tis to be hop'd he will not deny those four to be such, who, as mention'd by *Stow*, p. 327. oppos'd *Henry* the IVth's being made King; or *Owen Glondover*, the famous *Welch* Captain, who maintain'd a War against him in behalf of his lawful King, *Richard* the II. or *Dr. Frisby*, who, being ask'd what he would do if King *Richard* were present, boldly and stoutly answer'd, that He would fight in his Quarrel against any Man, even to the Death; wherefore he was condemn'd, drawn, and hang'd in his Religious Habit and Weed. I hope, I say, Mr. H. will not deny these Men to be *Non-jurors*, in the known sense of the Word, tho' they were not then call'd so.

"A few there were, says Mr. *Fuller*, whose relucting Consciences remonstrated against the least compliance with *K. Stephen*; whose high Loyalty to *Maud*, interpreted *Passiveness*

“ under an Usurper, to be *Activity* against the
 “ the right Heir. These even quitted their
 “ Lands in *England* to the Tempest of times;
 “ and secretly convey’d themselves, with the
 “ most incorporeal of their Estates (as occu-
 “ pying the least room in their Waftage
 “ over) into *Normandy*.—— As the *English*
 “ and *Saxon* Nobility had done before, when
 “ the Conqueror came first into *England* and
 “ seiz’d the Crown.” *Cb. Hist.* p. 27.

A. p. 3. It is no wonder, if some, who submitted, revolted afterwards, (and from what Kings have there not been Revolts?) or that when they revolted, they objected to the King’s Title, and made it a Pretext for their Revolt.

B. No; No wonder at all. We have several Instances of it: Let us take one for all, *Abner* set up *Ishbosheth* of the House of *Saul*, as King *de Facto* against King *David de Jure*, and out of discontent (see 2 *Sam.* 2. & 3. 8, 12.) revolted from him, and return’d to *David*; was he to be blam’d? Mr. *H.* dares not say so. The cause of his Revolt, it must be own’d, was not honourable, but the returning to his Allegiance, to his lawful Prince, was truly so. And tho’ ’tis evident, that he himself, as well as other great Men, whom he drew into his Party, had liv’d Subjects, and sworn Allegiance to King *Ishbosheth*, as Mr. *H.* would
 prove

prove out of *Huntindon*; yet his Revolt could not be charg'd with Perjury. For an unlawful Oath obligeth to nothing but Repentance. The Sum of what I have said is this, That Allegiance is due to the Lawful King, or him who comes to the Crown by Right of Inheritance; and tho' the Subjects of *England* have sometimes submitted to Kings *de Facto*, it was because they claim'd as *de Jure*: And this I shall further shew, by making good, that *William* the Conqueror, and all his Successors, reign'd by an Hereditary Title, or by a *Pretext* to it. *William* the Conqueror declar'd himself King by *Hereditary Right*, as well as *Conquest*. *William Rufus*, whom Mr. *H.* reckons the first King *de facto*, claim'd as *Testamentary Heir* to his Father *William* the Conqueror. See *Append. N^o 20.* *Henry* the First (*Robert* being voted Illegitimate), was chosen as next in *Blood*, by a Faction. *Stephen* was set up as Heir to *Henry*. *Mat. Par. Hist. Angl. de Coron. Steph.* p. 74. For *Hugh Bigot* the King's Steward declar'd upon Oath before the Archbishop of *Canterbury*, who was one of the *few*, that set him up, that when the King lay a dying he disinherited *Maud*, and thereupon constituted *Stephen* his Successor. *Hollinshead* says, That this *Hugh* was hired to swear, and for his Perjury, by the just Judgment of God, came shortly after to a miserable End. *John*, a *de facto*

facto King, says he came, to the Crown *jure hereditario*, & *mediante tam Cleri quam populi unanimi consensu*, & *favore*. Henry III. reign'd as Heir to King *John*, and tho' his Hereditary Title was not good at first, yet, upon the Death of *Elinor*, Sister to Prince *Arthur*, and next Heirefs to the Crown, he was King *de jure*. Henry the IV. claim'd as descended from Henry the III. as is before said, and Henry the V. and VI. as descended from him. *Richard* the III. a *de facto* King claim'd as *de jure*; and, he and his Parliament having bastardiz'd the Children of *Edward* the IV. was King *de jure* to all Intents and Purposes, (if according to Mr. H. a King *de facto* and Parliament have the Supream and Legislative Power of the Kingdom.) For the Parliament not only declar'd him in *Right*, King of *England* by Inheritance; but moreover that his Title was *Just* and *Lawful*, as grounded upon the *Laws of God and Nature*; and also upon the *Ancient Laws and Laudable Customs* of this Realm, and taken and reputed to be so, by all such Persons as were *Learned* in the *Laws and Customs*. And yet this is the King that Mr. H. brings in upon all Occasions as a King only *de facto*. Henry the VII. had no Hereditary Title of his own, and therefore he, as other Kings before him had done, got his Title such as it was, twice confirm'd by the Pope.

So

So that 'tis plain, that all those *de facto's* claim'd as *de jure*; which is, if there were no other, a good Reason for the Subjects not refusing to swear Allegiance to them.

And now I desire Mr. H. and all his *de facto* Brethren, to shew me any one King of *England*, who held the Crown and demanded Allegiance of the Subjects, as a *King de facto*, or ever any Subject that own'd the *Regnant* King, or swore Allegiance to him, under the Notion of a *King de facto*; and if they cannot (as I am sure they cannot) then it is evident,

First, That they have no manner of Precedent, either for their New Doctrines, or Practices in all the Volumes of our *English* Law, or History. And what, I wonder, becomes of Mr. H's *Constitution* and *Immemorial Custom*, when they cannot find one single Instance, either in *King* or *Subject*, from the beginning of this Monarchy, and through all succeeding Times, that can countenance or Patronize them. The King claim'd of *Right*, the *People* own'd that *Right*, and swore to it as *Right*. The Kings made *Laws*, as *Rightful Kings*, the *People* obey'd those *Laws* as the *Laws* of *Rightful Kings*. And it is impossible from hence to find a Precedent for these Men, who act upon quite contrary Principles and Foundations. Swearing and Obedience is, indeed, the same as it was; the same also to the *Rump*

or *Cromwell*; but the only Question here is, Upon what *Grounds* they were done? No Man can make a Precedent of another Man's Actions, except he does it upon the same Reasons and Intentions. Suppose a Man in the Innocency of his Heart swears to a *wrong* thing, supposing it to be *right*, this will not justify another Man, nor excuse him from *Perjury*, who knows it to be *wrong*, and at the same time swears to it.

Secondly, From hence 'tis plain, that the *Constitution* owns only Kings *de jure*, and knows no other; and the Reason is evident, because whoever pretended to the Crown, was at the same time (as is before said) forced to pretend an antecedent Right too, which had been superfluous, and to no Purpose, if the Law had owned any other Kings. 'Tis ridiculous to say, that they were really Kings *de facto*, whatever they pretended: For this strenghtens the Case, instead of answering it; for there had been no need of such *Pretences*, if the Law would have admitted them on any other Terms. And there can hardly be a greater Demonstration of the nature of our Constitution, that it *admits only Rightful Kings*, because, whatever the Men were, *Right* was always *Pretended*.

This was always the *Ground* of the *Claim*; these were the *Terms* on which they were owned and submitted to. From whence 'tis plain

plain enough, that whatever *Men* may do, the *Laws* do no wrong, they know nothing, support nothing, but what is *de jure*. Power and Force indeed may do otherwise, but whenever they do, they are not *protected* by the *Laws*, but the *Laws* and Constitution in such a Case are *invaded* and *oppress'd*.

A. When we hear of a numerous Party that espoused the Title of the H. of *York*, we are apt to look upon 'em to have been so many *Non-Jurors*.

B. To speak seriously, I should have been apt to think them *Non-Jurors*, or something worse. For if they took Oaths, either with *Reserves*, or *Resolutions*, to break 'em when opportunity offer'd, as I fear too many did *then*, and have *since*, they were really worse. And King *James I.* that wise Prince, knowing this, endeavour'd to ward against all such shifts, and therefore caused to be added to the Oath of Allegiance the Words following, viz. *All these Things I swear according to the express Word, by me spoken without any Equivocation, or Mental-Reservation, or secret Evasion whatsoever, &c.*

A. p. 5. But this is a great Mistake, for all the Partizans of that House liv'd in submission, and took Oaths of Allegiance to the three *Henry's*; nay *Richard* Duke of *York* himself, the *Heir* of that Family, swore Allegiance several

veral times to *Henry VI.* particularly in the 29th Year of his Reign.

ey B. Well ! What of all this ! Suppose this did submit and take Oaths too, to the Usurping *Henry's*, they did not destroy their Right, in the Opinion of the Great Men of the Nation ; for when *Richard Duke of York* made his Claim, they, after mature Deliberation and Consultation with Lawyers and Judges, concluded (notwith standing his Submission) with a *nemine contradicente*, *That his Title was good, and could not be defeated.* What would Mr. *H.* have more ? Here the Great Men (who were then the proper Judges) declare his Right and Title ; and tho' they objected at first, that they, and the Duke were under the Obligation of Oaths to King *Henry*, yet they never objected to him that, by swearing he had forfeited, or given up his Right to the Crown ; which they would certainly have done, if they had thought so. But it is very well known, tho' Mr. *H.* had concealed it, that, by the *English* Constitution, what our Kings are forced to do in duress against themselves and their own Right, is of no force.

s But perhaps Mr. *H.* will say, that after he was at Liberty, and had made his Claim, he swore Allegiance to *Henry VI.* in the 29th Year of his Reign. Well ! Grant this too, what then ? Why then, you'll say, he had quit-

quitted his Claim. I beg Mr. H's Pardon; no such Matter I can assure you, but the quite contrary; for the very swearing of Allegiance upon an *Agreement*, was so far from weakening his Title; that it rather strenthned it. And *Henry*, as well as his Barons and Great Men, by taking his *Submission*, effectually own'd his Right, and when as before, he reign'd only by Mr. H's Title of *Possession*, without *Right*, he now reign'd *de jure*, by Virtue of the Rightful Kings ceding from his *Right*, and giving his consent that he should *reign*, and without it he could not have been either *de jure*, or *de facto*. For the Great Men, who made the Accord and Agreement, made it with a Condition, that *Henry* should keep the Crown till his Death, if *Richard* WOULD, not else. How could this be, if *Richard*, being out of Possession, had no *Right*? So we have *Hen. VI.* himself, owning the Crown to belong to the *right Heir*, *Richard* Duke of *York*, as *Stephen* before had own'd the Right to be in *Henry* Duke of *Normandy*; notwithstanding his being out of Possession of it. And now I think these *de facto*'s owning the Right and Title of the King *de jure* is a stronger Argument for the King *de jure*, against a King *de facto*, than the King *de jure*'s for Reasons of State, allowing the King *de facto*'s Laws to stand in the Body of the Statutes, or to suffer them

them to be pleaded in *Westminster-Hall*, is for Allegiance, being due to them *only*, on the Account of *Possession*, that is, Possession without any prior Claim, and without Right. But if Mr. H. is not satisfy'd with this Account, let him read the Books following, which I suppose he has by him, *Viz. A Discourse concerning the Signification of Allegiance, &c. Animadversions on the 11th of Henry VII. The Case of Allegiance to a King in Possession. In Answer to Dr. Sherlock's Case of Allegiance, &c. in Defence of the Case of Allegiance to a King in Possession. Mr. Kettlewell's Duty of Allegiance settled upon its true Grounds, &c. An Answer to a late Pamphlet, Intitl'd, Obedience and Submission to the Present Government Demonstrated, &c. with a Postscript, in Answer to Dr. Sherlock's Vindication, of the Case of Allegiance, &c. The Case of Allegiance consider'd. Examination of the Arguments, drawn from Scripture and Reason, in Dr. Sherlock's Case of Allegiance, and his Vindication of it. Dr. Brady's Enquiry into the remarkable Instances of History, and Parl. Records us'd by the Author [Dr. Stillingfleet] of the Unreasonableness of a New Separation, &c. A Dialogue between A. and B. two Country Gentlemen, &c. And in these Authors he will find all that he has advanced in his View, fully answer'd; and it was part of his*

Artifice

Artifice not to put his Reader in mind of any one of them. I could name a great many more, but these are enough, and more than *he*, and *his* Lawyers can answer.

A. p. 5. His Revolt afterwards was under colour of Redressing Grievances.

B. That's a great mistake. *Richard's* Revolt (as *Mr. H.* calls it) was not *only* under colour of Redressing Grievances, but because *Henry* had broken those Articles he had enter'd into, and upon performance of which, he was to keep the Crown during his Life. *Appen. N^o 19.* See *Prinn's* Plea for the Lords, *p. 471.*

A. p. 5. And altho' his Son *Edward IV.* succeeded against *Henry VI.* and got the Crown, yet when he was driven from it, the Nation submitted again to *Henry VI.*

B. If you'll please to read on, you may find *Mr. H's* Answer to it, *viz. Precedents are not always Arguments of the strongest Kind*; and if he had added, that they are of the weakest Kind, and not at all to be rely'd on, he had come much nearer to the Truth. And his *so many* Bishops, and *so many* Lawyers, and *so many* Millions submitting, do not signify any thing in this Case. For it has been too common an Usage and Custom of *Englishmen*, to run without fear or wit, into all *Revolutions*, and to cry up, Complement, and Address, the *Rightful Prince* one Day, and an *Usurper* the next.

next. This has been an *Immemorial Custom*, and therefore, according to Mr. H. should be the *Common Law* of England: But at this rate, all our Government must run into *Hobbism* and *Mobbism*. We have a saying, That *there are more Knaves than Fools, and more Fools than Wise*; which, if true, we may see with half an Eye, how Things are like to go. The crafty Knaves will easily draw in the good natur'd Fools, to say and swear as they would have them. The generality of Men love to go with the strongest Party, tho' it be to do Evil, and *Englishmen* above all others, don't love to be singular, in numbring themselves, as *Sinacides* saith, with a multitude of Transgressors.

A. p. 6. This is to entertain a very mean, or a very hard Opinion of our Ancestors.

B. Ay! So it is, but who can help it, 'tis Matter of Fact? And though I should in Modesty allow them to understand what the Constitution was in their own Times, I have not, I must confess, Charity enough, for the greatest of 'em all, to think they always acted according to the strict Rules of Honour or Conscience; especially when they sat up Kings *de facto*, in opposition to the *Right Heir*, and when they had so done, swore Allegiance to 'em. To do so, was against Honour, Conscience, Justice, against the Laws of GOD and Nature, and of the *Fundamental Laws* of this King-

Kingdom. And Mr. H. may plead, as long as he pleases, for *Universal Practice*, and *Common Usage*; no Man that hath one Dram of Honesty, which is the best Policy, will allow, that *wicked Practices*, tho' never so *Universal*, nor *unjust Usage and Custom*, though never so *common*, can commence *Virtues*, or be the *Common Law* of any Kingdom, much less of this, where the Parliaments, when free, have declared all Mr. H's *de facto* Kings to be *Usurpers*, *pretensed*, and *time being Kings*, but they never bestowed such Glorious Titles on Lawful Kings, tho' Deposed, and in Durance, because they knew they had a Right by the *English Constitution*, and that 'twould have been ridiculous to have called them *Pretensed*, &c. who had both a *Divine* and *Human Right* to the Crown. And none but *Parsons*, *Goodwin*, and *Peters*, ever preach'd up such Doctrines; and if Mr. H. and others have a mind to be of their number, I know no one that will envy them the Honour.

A. p. 7, 8. But if we will be so severe, &c. we find the Subjects justified in what they had done by those Kings, who in all their Proceedings, and their Courts of Judicature, and in their Acts of Parliament own'd that very Authority, to which the Subjects heretofore had sworn, and paid their Allegiance. Could it then be the Duty of Subjects, to disown an
Au-

Authority for the sake of Kings *de jure*, which Kings *de jure* themselves own?

B. Yes, verily. It was their Duty to *disown*, and they did it too. And all Mr. H's fine Flourish and Harangue is answer'd in few Words, by saying, That all the Acts that were made by Kings *de facto*, during their Usurpation, that were for the Good of the Subject, and tended not to the *disinherison* of the Crown, or prejudice of the *Rightful Heir*, were never repeal'd, but suffer'd to stand in force, not as Acts made by *Usurpers*, but by the *Authority, Allowance, and Consent*; as their Coin was suffer'd to be current, of the King out of Possession. They were made, 'tis true, by *pretensed* Kings, and by *pretensed* Parliaments, but being done, in a *Parliamentary way*, that is, by the Lords Spiritual and Temporal, and the Commons in a *Parliamentary Form* assembled, their Authority was from the *Lawful King's presum'd Consent* to them, and what he would probably have done, had he been in Possession. And this may serve for an Answer to what Mr. H. asserts up and down in his Book, and to all his *pretensed* Authorities out of his *Tear-Books, &c.*

A. p. 13. *Bagot's Case* is that which has been usually urg'd and debated in this Controversy, &c.

B.

B. And that Case is sufficiently cleared in several of the *Treatises* before-mention'd, and particularly, in the Book Intitl'd, *The Case of Allegiance to a King in Possession*, from p. 15. to 25. and in an *Answer to Dr. Sherlock's Case of Allegiance, &c. In Defence of the Case of Allegiance to a King in Possession.* pag. 44. &c. That Author observes, " That Bagot's Counsel, in their Plea, do not urge the validity of a King *de facto's* Grants, without a *Limitation*, that it be no injury to the Legal Right of the Crown; and this (says he) he might think proper to observe, because the Reason of all that part of their Plea may require also, That the Acts of a King *de facto* should not be valid to the injury of the Legal Right and Title to the Crown, in the King *de jure*. And, (says he) I find it urg'd in another Part of the Plea, that Bagot's Patent ought not to be look'd upon as Null, because it was *a l' Advantage de cestuy Roy*, of King Edward IV. the present King, as it increased the number of *his* Subjects, and their urging it as for *his Advantage*, intimates, that they look'd upon it as a sufficient Bar to his Patent, if it had been to his *Prejudice*.

" However, (says the same Author) the Grants of a King *de facto*, to the prejudice of the Right of the King *de jure*, are not

D

" valid,

“ *valid*, I find to be as old Law, as the Reign
 “ of *Henry II.* He succeeded *Stephen*, who
 “ had usurp’d upon his Mothers and his Right,
 “ but was suffer’d to continue in the Throne
 “ for his Life, by Virtue of an *Agreement* be-
 “ twixt him and *Henry II.* When *Henry* came
 “ to the Crown, he revok’d all King *Stephen’s*
 “ Grants of the Crown-Lands, and when
 “ King *Stephen’s* Charters were produc’d a-
 “ gainst him, he thought it a sufficient An-
 “ swer, to tell the Persons that pleaded them,
 “ That *the Grants of an Usurper ought to be*
 “ *no Prejudice to the Lawful King,*” *Ap. 21. §. 57.*

A. p. 17. The Judges gave Judgment for *Bagot*; that is, for the Validity of the King *de facto’s* Patent, and consequently of his Royal Jurisdiction.

B. I think I have sufficiently Answer’d this in what I quoted out of the Author of Allegiance to a King in Possession.

A. p. 18. I need make no Remarks on the Points of Law maintain’d in this [*Bagot’s*] Case they are so plain.

B. And Mr. *Prinn*, in his Plea for the Lords, has as plainly and fully Answer’d it; and to him I refer Mr. *H.* and his Lawyers.
Append. N^o 20.

A. p. 18. The Year-Books—abound with Cases, &c.

B.

B. And to these Cases one of these Answer^s will be sufficient. First, That the King *de jure* was presumed to give his Consent to all Acts that were not to the Diminution of the Rights of the Crown, and so they became *His Laws*, tho' made by an *Usurper*. Secondly, That *Richard III.* and *Henry VI.* were both, in Mr. *H.*'s Sense, Kings *de jure*. For if an Act of Parliament, Bastardizing the Children of *Edward IV.* were good Law (as Mr. *H.* agreeable to his Principles, must own) then *K. Richard's* Laws were good, being made by a King *de jure* and Parliament. And if *Henry VI.* being declared King *de jure* by his Parliament could make him so, then his Laws were upon that account good Laws too, as made by a King *de jure*.

A. p. 16. Had *Edward IV.* granted a Pardon, when he was out of Possession, it would be void, even *now* when he is King in Possession, and therefore is void *in Law*, not void for want of *Power* to enforce it.

B. Yes verily, *for want of Power*, and for no other Reason. What doth Mr. *H.* think of *Edward* the Fourth, or any other King out of Possession? (*App. No. 20.*) Does he; or can he be so weak as to imagine that any Prince would yield that a Subject, to whom he had granted a Pardon, when out of Possession, should, after he came to the Throne, be Try'd,

Condemn'd and Executed, because he was *out of Possession* when he granted it ; this would be to own with a witness, that he was not *de jure*, because he was not *de facto* King. King *Edward* was none of those, he understood better things ; He was a Wise and Just Prince. Moreover let me tell Mr. *H.* that notwithstanding, all the Acts made by a King *de facto* to secure his Party from Punishment, in case he were Deposed, signifie not one rush, and the King *de jure* may, and ought, notwithstanding the Usurper's Laws, to Punish them by the Laws of *England*, (both *Common* and *Statute*) for resisting him, and assisting the Usurper of his Crown. And Usurpers understood this well enough, when they put the Laws in Execution against the Friends of the King *de jure* (for whose sake alone they were made) who, according to their Duty of Allegiance, opposed 'em, and play'd their own Artillery, the Laws, against them, as *Hudibras* truly and wittily observes, and expresses by a pat Simile, Part 1st.

*As when the Sea breaks o'er its Bounds,
And overflows the level Grounds,
Those Banks and Damms, which as a Skreen,
Did keep it out, now keep it in :
So when Tyrannic Usurpation
Invades the Freedom of a Nation,*

The

*The Laws o'th' Land, that were intended
To keep it out, are made defend it.*

If Mr. H. have a mind to see more, let him consult Mr. *Prinn's* Plea for the Lords p. 487, and he'll find enough against Usurpers, and to shew that Allegiance is due to the King *de jure*, tho' out of Possession, and not at all to the King *de facto*, tho' in full Possession ; and that He, and none else can *de jure* grant a Pardon. And there he may find too, a full Answer to *Coke's Seignior le Roy, &c.* And that K. *Edward's* Pardon was not void in Law, but only for want of Power. (*Append. N^o. 20.*)

A. p. 19, 20. As all the Judicial Proceedings in the Year-Books, are agreeable to that Maxim of the Law of *England* ; That *the Crown takes away all manner of defects and stops in Blood*, which is, I think, decisive for the Authority of the King in *Possession* ; so the Authority of this Maxim it self is very conspicuous in the same Books, where we read, that all the Judges, ——— when consulted about the Attainder of *Henry VII.* unanimously deliver'd it for Law, That *the King is a Person able, and discharg'd from any Attainder, &c.*

B. That *the Crown takes away, &c. in the Rightful Heir*, I own, and I know no one that denies it, and perhaps our Lawyers may have apply'd this Maxim to a King *de facto*, not as

de facto, but as *sub ratione juris*, as our *de facto's* generally claimed, as has been proved above. But if Mr. H. adds, *The Crown takes away all stops in Blood*, in every one that gets Possession, then, for ought as I can see, *Jack Cade* and *Wat Tyler*, had they taken Possession of the Throne, had been as much Kings as any of the **ROYAL FAMILY**, which even Mr. H's Lawyers were never so hardy as to assert. They always kept to the *Royal Family*, tho' not to the *next in Blood*, which is a tacit Acknowledgment, That Possession only did not give Right, there was something more, a sort of *Hereditary Right*, why else did they so religiously keep to one of the *Royal Line*?

A. p. 21. By the Common Law of this Realm, Kings *de facto* are Legislators.

B. Ay, as they rule *sub ratione juris*, not otherwise, and their Acts, 'tis granted, have been allow'd to pass for Laws when they were made, as Mr. H. words it, in a *Parliamentary way*, that is, according to the Methods observed in our *English Parliaments*, viz. of being read three times, and pass'd by the two Houses. Provided always, that they contain'd nothing to the *prejudice* of the *Crown*, and *rightful Heir*, and were for the *Good* and *Benefit* of the *People*, the Subjects of the *Rightful King*. They were not Laws of *England*, because made by Kings *de facto*, but because the King

King *de jure*, without the formality of a Confirmation, suffer'd them, like our *Common Laws*, by *Usage*, to become Laws of the Land, being, as is before said, for the *Benefit* of his *Subjects*, who had consented to them in a *Parliamentary way*, tho' under a *pretensed King*.

A. p. 24. Some say, that a King *de facto's* Acts are Legal, by the allowance of subsequent Governments——But as this Hypothesis is supported by no Authority, so is a Stranger to our Constitution, *&c. First*, It is a Stranger to our Constitution, in which *Customs* are sometimes——turned into *Statute-Laws*, but not *Statutes* into *Common-Laws*.

B. This is a Quirk. For tho' *Statute-Laws* are not turn'd into *Common-Laws*, yet they may obtain the force of *Statute-Laws*, made by Kings *de jure*, by *use*, as *Common Laws* do; and being made with the usual *formalities*, though by *pretensed Kings*, and *Parliaments*, shall have the same Authority, by *use*, as Acts made by *Lawful Kings* and *Parliaments* have had.

A. p. 24. It seems to be *inconsistent* with it self, for if Kings *de jure*, by *reciting* the Statutes of Kings *de facto*, give them their Authority; then is it not from *Immemorial Custom*.

B. Why so, I would fain know ? The Objector does not say, that they receive their *Authority* by *Immemorial Custom*, but Lawful Kings and Parliaments, by reciting them in their Statutes, and suffering them to be pleaded in *Westminster-Hall*, have given them the *strength of Immemorial Custom*, *i. e.* have made them as good Laws as others, even our *Common Laws*, which are so by *Immemorial Custom*.

A. p. 25. They did not receive their *Authority* from the Recital of *de jure* Kings.

B. Who says they did ? Does not the Objector say, That their Acts are Legal, *First*, by the *Allowance of subsequent Governments*. *Secondly*, By *Reciting*. *Thirdly*, By suffering them to be *pleaded*, so that 'tis not the bare *Recital* that the Objector stands upon.

A. p. 25. It is contrary to *Fact*. They have been always pleaded in *Westminster-Hall*, not as *Immemorial Custom*, but as *Statutes*.

B. And what then ? Does it therefore follow, that they were Laws merely by the Authority of Kings *de facto*, and not by the *allowance and presumptive Consent* of the King *de jure* ? We deny not the Acts made under *de facto* Kings, to be Statutes and Laws of the Land, but then we say, that, being made with all the *formalities*, as Statutes are made by Kings *de jure*, and their Parliaments, and allow'd

allow'd of by them (not being in *Diminution* of the *Crown*, and for the *Benefit* of the *Subject*, as has been said) they stand in our *Statute-Books* as *Laws*, made by Kings *de jure*, though made, as Mr. H. says, by Kings *de facto*; or rather by *pretensed* Kings *de jure*; for so, as observed above, our *de facto's* claim'd. Moreover, it is more than probable, that Kings might be advised by their Council, (having gained the Possession of the Throne, and being own'd as Kings *de jure*, and the *de facto's* declared *Usurpers*, and therefore no *Legislators*) not to unravel things too far, lest some of those Men in Parliament, who had gone too far in owning *Usurpers*, and making *Laws* under them, should be provok'd to make new Disturbances, and embroil the State before well settled. In troublesom and rebellious Times, Princes are in a manner forced to comply with a great many things, which in more calm and peaceable times they would never condescend to. Honour sometimes will stoop to *Conveniency*, and Right and Law to *Necessity*.

A. p. 26. Nothing more effectually confutes this Notion of these *Laws*, receiving their Authority from being recited, than a View of some of those *Recitals*.

B.

B. All the Recitals might be spar'd ; for we do not say that the bare *Recital* makes Laws, but that the King *de jure's Allowance* and *presum'd Consent*, &c. to Acts made, as Mr. H. directs, in a *Parliamentary way*, though by a *de facto* King and Parliament, makes them Statutes. But I can by no means grant, what Mr. H. says, p. 32. That *Kings de jure introducing Kings de facto, under the same Characters of Legislators with themselves and their Progenitors ; acknowledging their Statutes when they cite them to be of equal Authority with their own, or with those of their Progenitors ; acknowledging their Statutes, when they cite them, to be of equal Authority with their own, or with those of their Progenitors, is in Truth and Effect the same, as if Kings de jure had declared explicitly, that Kings de facto had the same Legislative Authority with themselves, I must own; but 'tis one thing to allow of what is done by an incompetent Authority, to be good and valid, and quite another thing to own, that the Authority it self is good and competent, as I shall shew in a more proper Place.*

A. p. 32. If it should be reply'd, with respect to the Statute of 14 *Edward IV.* that *Henry V.* was, by the *submission* of the House of *York*, a King *de jure*, this will not affect the Argument, because he was not so in the
Opi-

Opinion of the Legislator, *Edward IV.*, who calls him a King *in Deed*, and not of *Right*.

B. King *Edward*, 'tis true, calls *Hen. V.* King *in Deed*, and not of *Right*, and he was so and no other. For the *Submission* of the House of *York* did not make him *de jure*; for this was not done, as *acknowledging* any *Right* in *Henry*, but only because the H. of *York* when he was so, were not in a Condition, by reason of the Duress they were in, from the prevailing Faction, to claim their *Right*, unless they had a Mind to sacrifice all their Friends, and have their Hopes and Lives cut off at one stroke by an untimely Claim. And the Laws made by *Henry V.* were therefore good Laws, because *Edward IV.* was pleased to *allow* 'em to be so, and not because *Henry* made them, as has been often said, because Mr. H. so often repeats his Plea for the validity of Laws made by Kings *de facto*.

A. p. 33. No Authority less than that which made, can repeal a Law.

B. True. And an *Usurper* may repeal a Law made by a *Lawful* King, and a *Lawful* King may let it stand repealed; but it does not stand *repealed*, because a King and Parliament, who had no Legal Authority, repealed it, but because the King *de jure*, with his Parliament, did not think fit to *revive* it. In short, it stands repeal'd, not because the
King

King *de facto* did it, but because it was done in a *Parliamentary way*, and the King *de jure* allows of it.

A. p. 35. I come now to the Attainders, upon which, I wonder this Gentleman lays so great a stress, since he cannot believe these Attainders, either *made*, or *proved* the Persons Attainted, not to have been Kings and Legislators, &c.

B. As for *Attainders*, it must be confess'd, there is no great stress to be laid upon them, because they were used on both Sides. The King *de jure* Attainted the King *de facto*, and the King *de facto*, again the King *de jure*, and Parliaments did, as the prevailing King required 'em. But yet an indifferent Person might easily see where the Right lay. The *Usurpers*, 'tis true, called themselves *Kings*, and their Followers and *pretensed* Parliaments, made nothing to attain the Rightful King that opposed 'em, if he were too weak for them. But he that will consider the *English*, and not Mr. H's *Constitution*, that is, that *Inheritance*, and not *Usurpation*, is the fundamental *Constitution*, will quickly see who must be in the *right*, and who in the *wrong*, who is the *King* and who the *Usurper*, who *may* and who *may not* be attainted by the *English* Constitution. In a Word, Mr. H. proceeds all along through his whole Book upon *Practices*, and those of the
worst

worst sort, wicked and unjust Practices, and upon them founds his *de facto's* Right, as if unjust Practices, against the Laws of *God* and *Nature*, and of the *Land*, because *successful*, could make a *just Title*. He might as well, if he had pleas'd, argued for Idolatry against the true Religion, because the Heathen Gods had once Possession of the greatest Part of the World, and even in *Canaan* it self, *Baal* was so universally worship'd, and was in so full Possession, that *Elijah* the Prophet thought that he alone worship'd God, as to say that *Possessors* have *Right*.

A. Those that are attainted [by Kings *de facto*] cannot be Legal Judges.

B. Pray why not? Suppose *Henry VI.* had attainted those that were of King *Edward's* Party, should the *Usurper's* Attainder hinder a true Subject from serving and doing his Duty to his Lawful Prince when in Possession? I trow not. No, it would be so far from being an Hindrance, to his being a Lawful Judge, that it would be a very good Qualification, and so any Man of Sense must think. For if a Prince will not promote his Friends, because his *Intruder* has endeavour'd unjustly to disable them, whom will he promote? Not his Enemies to be sure; for that would be acting palpably against himself, and his own Interest, which none but Fools or Mad-men ever did.
But

But what Mr. *H.* drives at I know is this, that the Attainder of a *de facto* must be *reversed*, otherwise the Person attainted is not a *Legal Person*; but this is a gross mistake. Can a Man be an *illegal* Person, for acting according to the true Intent and Meaning of the Law, that is, for being Loyal to his Lawful Prince when out of Possession? And will any Judge give Sentence against such a one, when the Lawful King is in his Throne? 'Tis down-right Nonsense to suppose it: And though some have desired their Attainders to be revers'd, it was not that they thought the Attainders of a King *de facto* could hurt them, but out of abundant Caution, and for fear of a *New Revolution*.

A. p. 47. It may not be amiss here to take notice of another Objection, which is, That those Princes sometimes attainted some of the Leaders of the opposite Party, for adhering to their Rivals. But when they did this, their constant way of proceeding against such Persons, was by Attainders in Parliament *ex post facto*, and not by Indictments in the ordinary Course of Proceedings, which shews, I think, at the same time, That to serve the King in Possession was not a fault, nor could be punished as such, by the Laws that were then in *force*.

B. Now truly I think, Mr. *H.* is under a great, and I fear willful Mistake. For the true Reason

Reason why Kings proceeded by way of Attainder in Parliament, was not because *they had not Laws in force*, for that is notoriously false, for it was always Treason by our Laws, to be in Arms against the Lawful King, or to be aiding and assisting to his Enemies. But the true Reason why they were attainted and not try'd, as other Malefactors, was, because they were such notorious Rebels, that they ought to be made Examples of, by an extraordinary Way of Proceeding, to deter others from the like, but not for want of Laws, for our Laws were always against Rebels and Traitors, tho' they cannot always be put in Execution.

A. p. 43. The validity of Richard III. Acts was acknowledg'd, not only by all the Judges of the Realm, but also by the King [Henry VII.] and Parliament, who accordingly pass'd an Act to Reverse them, before the Persons attainted could sit in Parliament.

B. Grant this, what will follow ? Only that Henry VII. being King *de facto*, and Richard III. a King *de jure* (for so he was, if the King and three Estates declaring him so, could make him so, which Mr. H. pleading so heartily for the validity of Laws made by Kings in Possession, tho' without Right, must own) his Laws must be in force till repeal'd, as being made by a King *de jure*; and those that were attainted could not act (at least not with safety)

could
not

ty) till their Attainders were taken off. But suppose King *Richard*, to be only King *de facto*, yet those Attainders being against Persons, who had less Right than himself, being not of the House of *York*, but *Lancaster*, it was not safe for them to act, without a Repeal, for fear of another Turn of State, even tho' those Laws had been Nullities. All Rebels and Wrong-doers secure themselves by all the ways they can ; they know their own Guilt, and dare not trust to the Honour of Usurping Princes, for whose sake notwithstanding they dare, by open Rebellion, to venture their Lives and Souls too.

A. The Judges were without doubt well enough disposed to have given, and the King and Parliament to have receiv'd such an Answer [*viz.* that *Richard's* Acts were all Nullities] if the Constitution would have born it.

B. And why, I pray, would not the Constitution bear it ? Had *Henry VII.* been Lawful King, the Constitution would have born it of Course, but that he knew he was not, and so did the Judges too, that is, that he had no Constitution Right, being not the next Heir of *York*, or *Lancaster*. And he and all his Adherents were justly attainted, *Richard* having a better Title than *Henry* could pretend to, even tho' he came to it by Vile and Wicked Means, Blood and Murder ; if that Maxim be true,
which

which Mr. H. so often quotes and magnifies,
That *the Crown takes away all Defects.*

A. p. 48. But now on the other Side did the King in *Possession*, or his Parliament, or the Parties concerned, ever think an Act of Pardon was wanting for those who fought for him, against a Person out of Possession, whatsoever Title he had, or pretended to have. Can there be one Instance given of this in all our Laws or History?

B. In troth Sir, I can't tell whether there can or no, and it is not a Farthing matter, whether there can, or cannot; for my own Part, I cannot see any Reason in the World for such an Act, but I think there's a very good one why there should be none. For if a King *de facto* should have made, or procur'd such an Act to be made, it would have been an open Declaration of his *No-Right*, and that he and all his Adherents had been Rebels, as standing in need of a Pardon, which no *de facto* ever did or would do, who had any Brains of his own, or had any about him that had any. No Man, tho' never so wicked, cares to accuse himself, or be thought guilty of a Crime, if he can help it. All our *de facto* Kings, as I have often said, look'd on themselves as *Rightful*, and expected that their Subjects should do so too; and therefore 'twould have been Nonsense in them to make a Law, to indemnify
E those

a those who had fought for them. If they were *Kings de jure* it was their Duty, and 'tis a hard World indeed, if a Subject wants his Pardon for doing his Duty.

A. p. 49. An Objection has been made to the Legislative Authority of Kings *for the Time being*, from the 1st *Edward IV. Cap. 4. Appen. No 11.* which declares what Judicial Proceedings of the 3 *Henry's* shall stand good. The Objection is, That *some Acts of Parliament relating to the Town of Shrewsbury, and to the founding some Religious Houses, are there Confirmed, whence they infer, that the rest were in the same Condition, and wanted the like Confirmation.*

B. And in strictness no doubt they did. But King *Edward* having taken care in general of *Grants*, and particularly those made to the *Church*, was contented that all other Acts made, Provided that they were not *prejudicial* to the Crown, or were for the *Good* of the Subject, should be in full Force and Virtue; but had King *Edward* imagin'd that any one would have interpreted this Act of Indulgence, as Mr. H. does; he would have Damn'd all the 3 *Henry's* Acts, as King *Charles II.* and his Parliament did those of *Cromwell*, or else have confirm'd and stamp'd them with his own Authority, by an Act for that purpose, as Mr. H. adviseth.

A. p. 51. There can be no reason given why Kings *de jure* never make one Act to Confirm all the Beneficial Statutes of the Three Henries, and another to declare the others void. d.

B. Suppose now in a cross-Humour I should answer, That there was no need of either *formal Repeal*, or *Confirmation*, but that King Edward I. *Non-repealing* of their Acts, was sufficient to give them the Force of Laws, being *beneficial* to the Subject, founding it on that old Maxim in the Civil Law, *Quod fieri non debet factum valet*. For if that Maxim holds good sometimes in things that are in themselves unlawful, upon account of the Matter, much more upon the Matter being good and beneficial, tho' the Authority that made them was not Competent. This, for ought I can see is a good Reason, and looks like an Act of Grace in the King to his Loving Subjects, in condescending that *Usurpers* Laws, made for their good, should remain in force, tho' the Making of them was an Inroad upon his Royal Prerogative.

A. p. 51. Before *Edward* the Fourth's Time, tho' others pretended a better Right to the Throne than the Persons that possess'd it, yet they never assumed the *Royal Title* against the Regnant King, nor did the Constitution ever know any other King but the King that possess'd the Throne.

And since the House of *Lancaster* had been 60 Years in Possession of the Kingdom, and the Heirs of the House of *York* had almost all this time lived as Subjects under them, without setting up any Claim, obey'd their Summons to Parliament, and taken Oaths of Allegiance to 'em, particularly *Richard* Duke of *York* (who was the first of that House, that put in his Claim to the Crown,) it must be own'd that the *Lancastrian* Kings, at least *Henry* the Fifth and Sixth, were not only *in deed*, but of *right*, Kings of *England*; and therefore I may observe, in the second place, That the first time, this Distinction of Kings *in deed*, and not of *right*, was ever used, was *misapply'd*.

B. If Two of the Three *de facto* *Henries* were Kings *de jure*, how, I wonder, will Mr. *H.* make up his Number of Thirteen Kings, who from the Conquest to *Henry VII.* came to the Throne without *Hereditary Titles*, p. 1. But let this pass. Well! granting, as Mr. *H.* says, that the *right Heir*, who was kept out of Possession by a powerful *Intruder*, never assum'd the *Regal Title*, had he therefore *no Title* because in Durefs he durst not claim by it? Mr. *H.* dares not say that. Well! he did not Claim under that Title, and if he had, Mr. *H.* himself would have thought him Mad for his pains, when he was not in a Condition to assert

fert and recover his Right. For Usurpers, who cut their Ways to the Throne with their Swords, would make no scruple to Murder the next Heir, perhaps the whole Family, as *Athaliah* did, should he have claim'd his Right, when *Henry* was in Possession : We have had too many Instances of this barbarous Usage : And yet notwithstanding all this 'tis true, that our Constitution, being *Hereditary*, knows no other King but the *Heir*, tho' the People often swore Allegiance to the Usurper, who had no *Constitution-Right*. Ayl. but Mr. H. says, that even the *Heirs* of the House of *York* swore Allegiance to the *Possessor* of the House of *Lancaster*. All this might be, and yet the House of *York* might not give up their *Right*, or quit their *Claim*, but waited only for a more favourable Opportunity, when they should get out of Durefs. (*Append. N^o. 21. §. 75.*) They Perjur'd themselves indeed *in parte actus*, but that did not forfeit their *Title* ; that was still good, and the *Crown*, Mr. H. knows, takes off all Defects. I do not design to be an Advocate for those who take Oaths with a design to break 'em, far be it from me ; but if a certain Author, in his *Measures of Obedience*, allows a Latitude in Subjects Oaths, why may not the same be allow'd to Rightful Princes, when in the Power of an Usurper, till they can recover their Rights by his Death, or

their Subjects returning to their Natural Allegiance. Princes of the Blood, like Soldiers in a Garrison, swear to the Usurper in whose Power they are, to save their Lives, but think themselves bound no longer than while that Force lasts. But I have answer'd this already, and I think have made it appear, that notwithstanding *Richard Duke of York* swore to *Henry VI.* yet neither King *Henry* nor his Parliament thought he had quitted his Title by submitting; for they declared, that his Title could not be defeated; that is, That he was Lawful King according to our *Hereditary Constitution*, tho' *Henry* were in Possession, and his Family out of Possession for three-score Years, which is all that we contend for, and is a full Answer to all that Mr. H. hath said, or can say against the Right of a Lawful King, tho' out of Possession, and tho' he do not take on him the Regal Title.

A. p. 52. Edward VI. tho' he calls the three *Henries* Kings in deed, and not in right, yet he does not now pretend that his Ancestors were Kings in right.

B. Say you so. Suppose *K. Edward* does not in so many Words say they were Kings in right, yet if the three *Henries* were not Kings, those of the House of *York* must be. Does a Man loose a Right to his Estate because another has unjustly, by Fraud or Force, got Possession.

Possession of it ? Has an High-way-man a Right to my Purse, because he has taken it from me ? Has the Adulterer a Right to my Wife because he has taken her to himself ? I suppose Mr. H. will not say so ; and where, I pray, is the Difference between a *King's* and a *Subject's* Right ? I know of none, and, I believe, no-body else. I hope *David* was King, tho' *Absalom* had Possession of the Throne, and *Joash*, tho' *Athaliah* kept him out of Possession, and tho' he claim'd not the Crown, nor assum'd the *Regal Title* till *Jehoiada* the High-Priest had brought about the People to receive him. King *David* was as much King when out of Possession, as *Uriah* was *Bathsheba's* Husband, tho' *David* had taken her : For *David's* taking her did not give him a Right to her, she was still *Uriah's* Wife, and *David* was an Adulterer, and not her Husband, tho' he had Possession of her, and she had submitted to him into the Bargain.

A. p. 52. It may be observ'd from what has been said, That even since this Distinction (of *the de jure* and *de facto*) has obtain'd the Sovereign Authority of the *English* Government hath been ever acknowledg'd, both by our Laws and Lawyers to be lodg'd in the King *for the time being*.

B. Very good ; then *Cromwell*, being King *de facto*, or *for the time being*, having as much

the *Legislative* and *Executive* Power, as any of our Kings *de facto* of the *Lancastrian* Line, had as good a *Title* to our Allegiance as any of them. But our Laws call his Government an *execrable Usurpation*, and the Lord knows what, and did not allow him to have the *Legislative* Power, but repealed, revok'd, made null all his Acts. I know Mr. H. will have a Loop-hole here, and say, he never took on him the *Regal Title*. True, but tho' he took not on him the *Title*, yet he took upon him the *Regal Power*, and acted as King, to all Intents and Purposes ; and PROTECTOR, the *Title* he took, was but another Word for King *de facto* ; therefore if he will stand by that Assertion, *That a King de facto hath ever been acknowledg'd to have the Sovereign Power, and that Allegiance is due to him, and him only ; CROMWELL* had as good a Right as any of Mr. H's *Time being Kings*, and King *Charles*, according to his Hypothesis, none at all, nor could Treason be committed against Him, being *out of Possession* ; nay the Regicides themselves had very hard Measure to be Drawn, Hang'd and Quarter'd, for putting to Death, (not to say *murdering* King *Charles's I.*) being, as he certainly was when in Prison, *out of Possession*. These are Blessed Principles for a *Church of England-man* to maintain !

tain ! What Difference, as to this Point, is there between a *Jesuit*, *Phanatick*, and a *Church-man* ? Just none at all.

A. p. 52. 'Tis objected that *Richard Duke of York* put in his Claim in Parliament, in the 39th *Henry VI.* and that the Lords declared his Title could not be defeated.

B. And will Mr. H. deny this to be a good Declaration ?

A. p. 54. Yes. Because it was but a *partial Declaration*. It is not, says he, without Reason, that I have call'd this a *partial Declaration* : For during the space of 60 Years, that the H. of *Lancaster* had sat in the Throne, we never heard of such a Title in the H. of *York*, as could not be defeated till this Time, when the King's Army was first defeated, &c.

B. Did Mr. H. never hear of that Maxim in our Law, that *nullum tempus occurrit Regi*. There was a Reason, and a very good one, why they did not claim. Would Mr. H. have the H. of *York* put in their Claim, when they had no Power to recover their Right ? This would have been the ready way (as above said) to have their Title defeated, with a Witness, that is to have the Line of *York* murdered; for *de facto's* as well as Kings *de jure's*, who cut their way to the Throne with their Swords, and the Destruction of their Rival Kings, (p. 9.) would never have spar'd their Lives. But they and their

their Friends knew better Things. *Richard* Duke of *York* believed this was the time; and tho' he fail'd in the Attempt, he made way for his Son *Edward*.

A. p. 55. They [the Lords] might have declared upon the *Principles* of the Gentlemen, with whom we are disputing, That the Title of the Duke of *York*, not only could be, but actually was defeated by his long Submission, by obeying Summons to Parliament, and by Oaths of Allegiance to King *Henry VI.* particularly that which he took in the 39th Year of his Reign. ——— They must, I say, acknowledge the Duke of *York's* Title was defeated upon their own Principles.

B. I see no Reason at all for this.

A. p. 56. Let us borrow their own Principles and Answers, and apply them to the present Case. Had not the Heir of the H. of *York*, as well as all the People of *England*, liv'd longer in Subjection to the King's of the H. of *Lancaster*, when this Declaration was made; than the Senate and People of *Rome* had to *Tiberius* and *Augustus* together, when Our Saviour gave this Command of giving unto *Cesar*, &c.

B. Yes, doubtless. But I would advise Mr. *H.* to read *Jevian's* Account of those two Reigns.

A.

A. p. 56. Have we not more certain Evidence of the Oaths, which *Richard Duke of York* took to *Henry VI.* than we have of the Truth of the *Lex Regia* of the Romans, or in any Act of the Resignation of the Regal Family of the *Jews*?

B. Well, let this be granted too.

A. p. 56. Was not the Oath of *Richard Duke of York* a more full Recognition of *Henry VI.* Right, and Renunciation of his own Right?

B. No, by no means, but just the contrary. That which *Mr. H.* calls a Recognition of *Henry VI.* Right, was in Deed, or *de facto* *Henry VI.* Recognition of *Richard Duke of York's* Right. For *Richard Duke of York*, took this Oath upon an Agreement made between them, which was a plain Acknowledgment on *Henry's* Part, that the Right was in *Richard*, and that he held the Crown by *Courtesy* from him; *Richard* wav'd his Right till *Henry's* Death, or Cession, but the taking an Oath to him, only on that Account, was far from being a Renunciation of his Right on his own Part, but was a full Renunciation and Recognition of it on King *Henry's* Part, and a fair acknowledgment that he was, till then, an unjust Possessor, or an Usurper.

A. p. 57. If all this be true as it is, They must confess the Duke of *York's* Title was defeated.

B.

B. If all be true, which I have said, as it is, The Gentlemen may still say, that the right of the *Jews* and *Roman Senat* was defeated, and that the *Roman Emperors* were Rightful Governours, because the *Jews* and *Roman Senate* had submitted and sworn Allegiance to them ; and yet nevertheless the H. of *T.* tho' they had sworn Allegiance to the Possessor, had still a *good Title*, and such, as the Usurper by the Agreement own'd. The *Gentlemen*, he speaks of, may abide by their Answer, and yet not own that the *Dukes Title* was *defeated*, and may boldly assert, That his Title was not *actually defeated*, by the *Legislative* Power of the Realm. Neither need they acknowledge, that this Declaration of Parliament proves too much, for it proves what it was brought to prove and no more, *viz.* That *Richard* [by *Henry's* yeilding to an *Agreement*] had the *Right* to the Crown, tho' he was *out of Possession*, and was King *de jure*, to whom the Kingdom belong'd, according to *our Constitution*, tho' he allows *Henry* to be, by way of *Deputation*, King *de facto*.

A. p. 57. Lastly, This Declaration of the 29th of *Henry VI.* as well as the Acts of *Edward IV.* were repeal'd and annull'd by Act of Parliament, when *Henry VI.* recover'd his Throne, &c.

B. Mr. H. knows those were troublesome Times, and it would be ridiculous to suppose all that was done in such Hurly-burlies, and Turns of State, should go for Law. 'Tis too plain to be deny'd, that Parliaments, not Lawfully conven'd, have made and repeal'd Laws ; declared *Usurpers* to be *Lawful* and *Rightful*, and justify'd the Deposing of *Lawful Kings* by *Usurpers* ; and again have *Recogniz'd* the *Right Heir*, and declar'd the *Usurper* to have been King in *Fact*, and not in *Right*, as in the Case before us, of *Edward IV.* and *Henry VI.* Parliaments are made of Men subject to failings, and he must be a very bold Man indeed, that will say Parliaments are *Infalible* and cannot err.

A. p. 59. 'Tis a Proof of the Sovereign Legislative Power of a King *de facto*, and his Parliament, since they can repeal Acts pass'd in Parliaments, holden under *Hereditary Kings*.

B. Does it follow, that because Kings *de facto* have repeal'd Acts made by *Hereditary Kings*, that they have a Right so to do ? I always thought that nothing was *Lawful*, but what might be done *Lawfully*, *id possumus quod jure possumus*. *Cromwell* was King *de facto*, and repeal'd Laws. And if Mr. H. says, that his Acts were not fully own'd by the *Hereditary King*, that will not answer the
Diffi-

Difficulty, for if he had the Authority, and was the Legislator *for the Time being*, the Heir ought according to Mr. H's Hypothesis, to have own'd his, as well as any other King *de facto's* Acts, being King by Mr. H's *Constitution*, that is, in *Possession*. Ought not this then (to use Mr. H's Words *p. 8.*) " to conclude
 " all private Subjects? Can Mr. H. then dis-
 " own this Authority, without opposing his
 " private Sentiments to that which himself
 " acknowledges to be the Supreme Authority
 " and Judgment of the Kingdom? "

A. *p. 60.* Since the Kings *for the Time being*, with their two Houses of Parliament have the *Legislative* Power, they must also have the *Supream* Power, the former being, as I have said, always essential to, and inseparable from the latter, *p. 25.*

B. Therefore *Cromwell* having the *Legislative* Power was *Supream*, and King *for the Time being*, and all *Englishmen* his Subjects, according to Mr. H's *Constitution*.

A. *p. 60.* Lastly, If the King *for the Time being*, hath both by *Statute* and *Common-Law* the *Legislative* Power, then the Obedience of the Subject is due to his Laws.

B. And then, say I, the Obedience of the Subjects was due to *Cromwell*, and then let us lay aside the 30th of *January*, and the 29th
 of

of *May*, and no more mock *God*, and banter the People, with *pretended* Fasts and Thanksgivings.

A. p. 61. The 25th of *Edward III.* declares what Offences shall be *Treason*.

B. That's true. But then 'tis to be understood, that he being then King *de jure* made that Law to secure the Succession in his Family, against all Attempts of *Usurpers*. And no one can be so senseless, as to think he would make Laws in behalf of *Usurpers*, to the Prejudice of *himself*, his Son, and his *Posterity*.

A. p. 61. And we have the Opinions of two great Lawyers, My Lord Chief Justice *Coke*, and Lord Chief Justice *Hales*, (and no great Lawyers Opinion, as far as I know, to the contrary) That by Our Sovereign Lord the *KING*, in this *Statute*, against whom these Offences are *Treason*, is to be understood *only*, of the King in Possession of the Crown and Dignity, tho' he be *Rex de facto & non de jure*.

B. I grant you that this was *Coke's Doctrine*, but perhaps not his *Opinion*. For to be plain with you, 'tis very ridiculous, and no Man can be so silly as to imagine, that King *Edward*, a wise Prince, would make a Law to disinherit his own Children. Mr. *H.* himself will not allow of it, for he says, p. 71. " After
" the Crown had been entail'd in the first Year
" of

“ of *HENRY VII.* Reign, on the Heirs
 “ of his Body; can we believe that he de-
 “ sign’d this Act of the XIth of his Reign,
 “ to break the *Succession* of his own Children?
 “ Undoubtedly he did not. Let Mr. H. apply
 this. And for his further Instruction, let him
 read Mr. *Prin’s Plea for the Lords*, p. 482.
Appendix, No 20, and he will see My Lord
 Chief Justice *Coke’s* Opinion, if it were his
 Opinion, sufficiently confuted, and his Lord-
 ship expos’d for it. Mr. H. perhaps will not
 allow *Prinn* to be a Lawyer; but if he fairly
 refutes My Lord Chief Justice, I hope he will
 allow him to have as much *Reason*, though
 not so much *Law*, as the *Oracle*; and per-
 haps he had more of that too, tho’ he made
 an ill use of it sometimes, as *Coke* did, who
 when he was laid aside by King *Charles I.*
 turned Chicaneur to the Crown. But let us
 compare *Coke* with *Coke*. Does not *Coke* him-
 self, in *Calvin’s Case* say, That the King hath
 the Crown of *England* by *Birth-right*, being
naturally procreated of the *Blood Royal* of this
Realm, and that Allegiance and Obedience of
 the *Subject* is due to the Sovereign by the
Law of Nature, which is *immutable*, and can-
 not be alter’d: And if *Coke* says so, and be
 in the right, the King *de facto* cannot be the
Seignior Le Roy, for the *Law of Nature* ab-
 hors all *Injustice* and *Usurpation*, and so does
 the *Law of England*, for he says, The *Law*
 of

of *Nature* is part of the Law of *England*, so we have *Coke*, if we have no other great Lawyer on our Side. But we have more, for *Coke* himself quotes *Bracton* and *Fortescue* to strengthen this Opinion.

As to Judge *Hales's* Opinion, as 'tis represented in that Book [*Pleas of the Crown*, Chap. *Treason*] 'tis of no Value in the World, and the Reasons we have in the Preface by the Editor of it, as that 'twas a *Posthumous Work*, never set out by himself, that 'twas written in his younger Days, about the End of *K. Charles I.* that 'twas never read over by him since he wrote it. See his *Life*, by Dr *B.* p. 36. And whatever is deliver'd in such Circumstances, can have no Weight, and the great Authors Name is abus'd by such Quotations ; and it would be a fine Piece of Argumentation, if every thing that a Lawyer writes, either to help his Memory, or to be Topicks for mootings, or pleading, must presently be suppos'd to be his own Judgment ; at this rate we may in time have Councillors Breviates printed amongst their Works, and the Editor may call 'em Reports too, if he pleases ; but no one that is a Lawyer would make use of them, tho' Mr. *H.* does.

And to let Mr. *H.* see that we are not destitute of Lawyers on our Side, tho' we should give him his two Lord Chief Justices, Let him consult *Moore's Reports*, p. 798. and

there he will find, That *Allegiance follows the Natural Person*, (and that must be of the King *de jure*) for (says he) *if the King is by force driven out of his Kingdom, and another Usurps; notwithstanding this, the Allegiance of the Subject does not cease, tho' the Law does, i. e.* The Allegiance to the King *de jure* does not cease, tho' out of Possession, and an Usurper in the Throne. *Allegiance*, says he, in another Place, *was before Laws*. And as My Lord Cokes says, in Calvin's Case, *True and Faithful Legiance and Obedience is an incident, inseparable to every Subject as soon as he is born.* Fol. 5. and he calls it *Natural Allegiance*, which can never be due to a King *de facto*, in opposition to a King *de jure*. It may not be amiss to acquaint Mr. H. That all the Judges agreed in these Opinions. And so we have great Lawyers Opinions, tho', he says, *he knows of none.*

A. p. 64. *Treason*, which is the highest Violation of Allegiance, can be committed against none, but him, to whom Allegiance is due.

B. True. But then pray take this with you, That Allegiance, which my Lord Coke says is *Natural*, is due only to the *Hereditary King*. It must be own'd indeed, that *Usurpers* always requir'd Submission and Allegiance, but that did not make it their *due*, tho' Subjects, and some Princes of the Blood, to whom
the

the Crown of Right belong'd, being in the Power of the *Usurper*, paid him a *Submission*, which they ought not, as *Richard Duke of York* and his Family, to preserve their Lives; yet they did not loose, nor the *Usurper* gain any *Right* by their *Submission* in their Durefs, as is shew'd above.

A. p. 62. As *Edward III.* and his Parliament intended to declare those Offences Treason, which were so before by *Common-Law*, or *Usage*; so by *King* in the Statute, against whom these Offences shall be adjudg'd *Treason*, they must intend *the King*, against whom they were held to be *Treason*, before by *Common Law*, &c. which was always the *Regnant King*, altho' without an *Hereditary Title*.

B. I marry, Sir, now we have it. They must intend *the King Regnant*, tho' without an *Hereditary Title*. Mr. H. is a bold Man to assert this, for I believe he has not one Lawyer since the Conquest (provided he can find one *Regnant King* without an *Hereditary Title*, or a *pretence* to it) that will stand by him in this Assertion. Does he, or any Body else imagine, that our *Hereditary Kings* made Laws to secure the Crown to them and their *Heirs*; and at the same design'd them for the Benefit of *Usurpers*, that is, of those who should keep them out of Possession, and deprive them of their Inheritance? If they did, they deserv'd

to lose their Crowns, and to be begg'd for Fools into the Bargain. Tho' *Edward III.* was no other than an Usurper, in the beginning of his Reign, when he was young, yet he was Lawful King when he made that Statute of Treason; and in all probability reflecting upon his own Unnaturalness, of which he was sensible, in taking his Father's Crown, took care, as far as he could, to prevent the like for the future; to be sure he did not design, as Mr. H. says, to *break the Hereditary Succession of his own Children*, and set Usurpers upon the same Foot with them. *App. N^o 9.*

A. p. 62. But we shall be easily determined to this Sense, if we consider farther, that from the Conquest to *Edward III.* Reign, and for 100 Years after, the Distinction of King *de facto* and King *de jure* was not known.

B. Well! And suppose it had never been known, the thing was known; and tho' the Parliament gave not the *Regnant* King the Title of King *de facto*, nor the *right Heir* that of King *de jure*, yet they knew who had the Right, and who had not. And those *out of Possession*,-(tho' they took not on them the *Regal Title* were so in truth, and when they recover'd their Right were look'd upon as such from the Demise, not of the *Usurper*, but of the *Rightful Predecessor*. So *Edward IV.* was reckon'd (1 *Edward IV.*) from the Death of his

his Father, *Richard Duke of York*. (See *Prinn's Plea for the Lords*, p. 467, and 468. *Append. N^o 20.*) and King *Charles II.* from the Murder of his Father the Blessed Martyr.

A. p. 63. The Pretenders to a better Right to the Throne than the Prince that was in Possession ——— contented themselves with the Titles of Dukes of *Normandy*, &c. none of their Friends gave them the *Regal Title*.

B. What poor Stuff is this! Suppose they neither took the *Regal Title*, nor others gave it them, had they therefore no Right to it? That's hard indeed! Does not he know there are Cases when a Man dares not say his Soul's his own?

A. p. 63. By *Our Lord the King*, in the Statute of *Treason* must be intended the King in Possession; since by the *Common Custom and Usage* of the Kingdom, he was the King, and there was no other King but he.

B. *Must* is for the King, we say. But by what Authority Mr. H. talks so Magisterially, I know not. But pray why *must* the King in Possession, right or wrong, be the King against whom *Treason must be intended*? Was not *Roger Mortimer* put to Death for *Treason* in Murdering *Edward II.* tho' out of Possession? Were not the Murderers of King *Charles I.* Executed for *Treason*, tho' he was out of Possession? And were not others Executed, and

pardon'd for Treason, against King *Charles II.* tho' *out of Possession* ? And does not the Statute 25 *Edward III.* make it Treason to compass or imagine the Death of the King's eldest Son and Heir, who has no Right to Possession during the Life of the Father ? *App. N^o 9.* By these Instances it evidently appears, that Treason may be *intended*, and *committed* against a Prince *out of Possession*, and therefore it cannot be true, according to the Laws of *England*, that the Treason can be *intended only* against the King *Regnant*, or in *Possession*. Nay, we have a famous Instance of an Act repeal'd, that was made by a King *in Possession*, and the Reason of that Repeal given, *viz.* because *Edward II.* the King *de jure* out of *Possession*, was then living, even tho' he had made a sort of Resignation of the Crown. See *App. N^o 6.* Moreover, I desire to know of Mr. H. by what Authority Parliaments have attainted Kings and Princes of the Blood, as *Henry VI.* and his Son were, *App. N^o 21. §. 74.* if *Treason* cannot be committed against the Right Heir *out of Possession*, was it not because they had unjustly possess'd themselves of the Inheritance of the Crown, and claim'd Allegiance to be paid to them, which was due only to the Heir ? *Coke* in his 7th Report says *Legiance*, or *Faith* of the Subject is *proprium quarto modo* to the King, *omni, soli,*

soli, & semper. And the King, saith he, in another Place, *holdeth the Kingdom of England by Birth-right inherent, by descent from the Blood-Royal, whereupon Succession doth attend, and therefore it is usually said, to the King, his Heirs and Successors, wherein Heirs is first nam'd, and Successors is attendant upon Heirs.* And yet in our Ancient Books, *Succession* and *Successor* are taken for *Hereditance* and *Heirs*. *Bracton, l. 2. cap. 29.* And in his 5th Report, l. 34. he says, *The Kings of England, who are Monarchs, and Absolute Princes, hold their Dominions and Kingdoms by Lawful Succession, and by inherent Birth-right, and Descent of Inheritance* (according to the **FUNDAMENTAL LAWS** of this Realm.) *App. N^o 21. passim.*

A. p. 63. He [*the King in Possession*] was the *King*, and there was no other *King* but *he*. Unless any one will run into so great an Absurdity, as to say, that for the greatest part of the Time from the Conquest to *Edward III.* Reign, *England* was a *Monarchy* without a *Monarch*.

B. I think 'tis as great an Absurdity to say, that *England* is an *Hereditary Monarchy* without *Right of Inheritance*, as to say *England* is a *Monarchy* without a *Monarch*.

A. p. 63. ——— And there was Allegiance and Treason, but no King to whom one was

due, and against which the other might be committed.

B. Yes, there was always a *Rightful King*, tho' sometimes kept out of Possession by Mr. H's King, *without Right*, to whom Allegiance was due, by *God's Law*, the *Law of Nature*, and by the *Laws of the Land* too, and against whom, and no King else, Treason could be said to be committed. " Since therefore Treason can be committed only against the King *de jure*, and our *Hereditary Constitution* knows no other *King* but him ; Treason, which is the highest Violation of Allegiance can be committed against none but him, to whom Allegiance is due. *i. e.* the King *de jure*."

A. p. 64. And so I come to the famous Statute of the xi *Henry VII.*

B. And I might send him, and his Friends, to a Book Entitl'd, *Animadversions upon the Modern Explanation*, of the xi of *Henry VII. cap. 1.* or *&c.* And to *the Case of Allegiance to a King in Possession, with the Defence, &c.* where he may meet with such Arguments against his Notions, as neither he nor all his *great Lawyers* are able to Answer. But because those Books are not easily to be met with ; I will venture to say something to it my self. And *first*, I say, That King *for the Time being*, is a doubtful and ambiguous Expression, and used on purpose

pose by *Henry VII.* and his Parliament, to impose upon ignorant and unwary Subjects : For *first*, King *for the Time being*, may be taken for the King *de jure* in Possession, in opposition to a King *de facto*, he being in the most proper Sense, *the King for the Time being* ; and then without all peradventure Allegiance is due to him, and the Subject ought to be *indemnify'd* for fighting for such a King ; and it must be against *Reason, Law, and Good Conscience*, nay, and *Common Sense* too, that for his attending on such a King in his Wars, he should lose or forfeit any thing. 2^{ly}, It may be taken in an *improper* Sense, for a King, or any other Person, who is in Possession of the Throne *without*, or *against* Right, and then 'tis against *Reason, Law*, and all *good Conscience*, that they who fight for such a one, against the King *de jure*, should be *indemnified*. See *Ap. N^o 20.* For their very fighting is Treason, because it tends to the Disinheriton of the *Rightful Heir*. And indeed this *Dangerous Law*, as *Dr. Burnet* truly terms it, *was made to secure the Usurper against those who had a better Title.* Reply to *Mr. Varrillas*, p. 71.

A. p. 65. This Law never appears with so great Advantage, as after such a View, as we have taken of the Legal Authority of the King *for the Time being*.

B.

B. Mr. H. is certainly in the right on't : For if you'll be so obliging and good-natur'd to grant, what he neither has nor can prove, That the King in Possession, *right* or *wrong*, is the *Constitution-King* ; then this Law does appear with great Advantage indeed !

A. p. 65. They have objected to the Authority of the Legislator, *Henry VII*, as not being a King *de jure*.

B. And whoever said he was ? Does not Dr. Burnet, that Impartial Historian, say, *That Henry weakned the Rights of the Crown of England, more than any that ever reigned in it ?* And does he not say again, *That he [Henry VII.] Knew that he could not found his Title on his Descent from the House of Lancaster, for then he would have been no more than Prince of Wales, since his Mother, by whom he had that Pretension, outliv'd him a Year, and he would not hold the Crown by his Queen's Title, for then the right had been in her, and had pass'd from her to her Children, upon her death. And therefore he, who would not hold the Crown upon such a doubtful Tenure, made that DANGEROUS Law, that whoever is in POSSESSION of the Crown, is to be acknowledg'd as the Legal King.* Dr. B's Reply to Mr. Varill. p. 71.

A.

A. p. 65. Kings, even for the Time being, have been own'd for Legislators in our Constitution, and neither *Common*, nor *Statute Law* do make or allow any difference to be made, betwixt the Legislative Power of a King *de jure*, and a King *de facto*.

B. This is much more easily said than prov'd. Where, I pray, do our *English Laws* say so, no where. But our Statute-Laws give very hard Words to all that have taken the Crown by *Usurpation*, that is, that have been, in Mr. H's sense, *Kings for the time being*, as *unrightwise pretended, without Title*, in *Deed* and not of *Right*, and what not. These are very coarse and uncourtlike Complements to *Legislators*, and *Constitution Kings*, let me tell you. But such our very Parliaments have bestow'd on Mr. H's Legislators. And tho' their Statutes, which were not made to the Prejudice of the Crown, and Legal Heir, and for the Benefit of the Subject, have pass'd, by *Allowance*, for good Laws, yet they had not their Force and Virtue, as made by *them*, but as *consented* to by the *People*, in their *Representatives* in Parliament, and as done in a *Parliamentary Way*, and as having the *Presum'd Consent*, (as I have often said) of the *Rightful King*. α

A. p. 66.

A. p. 66. But a Learned Gentleman, who in his Remarks on this Statute made this Objection [that *K. Henry* was not a Rightful King] has since acknowledg'd, that *Henry* was Rightful King. Indeed in his *own*, or his *Wife's* Right, He had all the Titles that could be to the Crown.

B. How could he have *all the Titles that could be*? When *Dr. B.* says, having *no Title of his own*, he made this *dangerous Law*. But, *Mr. H.* says, he had the Crown in his *own* or his *Wife's* Right! As for his *own*, his Friend *Dr. B.* has cut him off there, as is said. And as for the *Queen's* Title, the same Historian says, he *would not* hold by that. And the Parliament of *England* will not allow of *Conquest*, that's plain, as *Mr. H.* and the *Dr.* both know. But if we should grant, that by marrying the Heiress to the Crown, he were allow'd the Title of King, it would be but a bare Title, he could be no more than a *Matrimonial* King, he could have no Authority. But I suppose, *Mr. H.* will say, that he was King in his *Queens* Right. Very good! Why then will some Politicians say, that if she had dy'd before him, he would not then have been so much as a *de facto*, without the Consent of his Son, or next Heir, for the Right then would descend to him or her. And if He or She should think it their Right, they would be attempting to dethrone him.

Crowns

Crowns are tempting Things to young Princes! And then if the Attempt had succeeded, he had been but a *Subject*. But after all, if (as Mr. H. seems to hint) reigning in a *Wife's Right*, without her quitting of it, (as his Queen never did) will make a King *Rightful*, then, as far as I can see, all our *de facto* Kings have, in this Sense, been *de jure* too, for they all reign'd, as Henry VII. did, in *others Rights*. Stephen in the Right of *Maud*, to whom he had sworn Allegiance. Edward III. in the Right of his Father. Henry IV. V. VI. in the Right of the Family of *York*. And so now after all the Talk of a King in *Possession*, and *de facto*, 'tis plain, all our *de facto* Kings were *de jure*, either in their *own Rights*, or in *Somebody's* else, and did, only out of Tendernefs and stark loving Kindnefs, as Henry VII. did by his Queen, take the Crown to ease them of the Trouble and Burthen of it. Well, 'tis a thousand Pities, that such good-natur'd Princes should be so shamefully mis-represented, as they are, and stil'd *de facto's* and *Usurpers*, and God knows what.

A. p. 66. It hath been objected, that this Act doth only *indemnifie*, &c.

B. But I say, it does not so much as that : For if Subjects fight for a *Possessor* against a King *out of Possession*, this Statute cannot *indemnifie* them ; for if any of them be found in
Arms

Arms against the *Heir*, this Act will not secure them. We know, it did not secure the Duke of *Northumberland*, who acted under the Broad-Seal of Queen *Jane*, who was in Possession, as much, tho' not as long as any of the *Henry's*, and sat in Council, and emitted Declarations as such, and therefore had as much Right to plead it, as any could have. And the Regicides, in King *Charles II's* Time, might have pleaded the same, and some did, but it would not do. And indeed it is against all *Reason*, *Law*, and *Good Conscience* that it should. Shall not a *Lawful King* hang Rebels and Traytors against his Crown and Dignity, because an Usurper forsooth, has made a *Law* to *indemnify* them, to secure himself in his unjust Possession? Such a *Law* is and must be void in it self, as it tends to the Disinheritance of the *Lawful King*, for what can tend more to dis-inherit him, than an Act to *indemnify* all those, who contrary to their *Natural Allegiance* take up Arms to keep him out of the Possession of that Right, which the *Law of God*, *Nature*, and the *Laws of the Land* have given him?

A. p. 66. It has been farther objected, that this was a *Temporary Statute*, &c.

B. And so it was for any thing *Mr. H.* in his fine flourish, has said to the contrary. But whether it were *Temporary* or not, is not very material. It was certainly a very ridiculous Act;

Act, if it were design'd, in Mr. H. sense, for a Perpetual Law : For what can be more ridiculous, than to pretend to tye up the Rightful Heir from punishing such, who have been in actual Rebellion against him, because another forsooth, was King, *for the time being*, against *Law, Reason, and Good Conscience*. Neither *Reason, Law*, nor good Conscience can justify, or indemnify Rebels, unless Injustice can commence Justice, because it has *Success* ; or Iniquity, when *prosperous*, may be establish'd by a Law.

A. p. 69. It is objected that the 11th of Henry VII. is *virtually* repeal'd by the Act of Recognition, 1 Jac. I.

B. And I think, the Objector was very modest in saying it was only *virtually* repeal'd ; perhaps, if he had said it was *actually* repeal'd, he might have justify'd it. For if *Hereditary* should be put instead of *Time being*, and *Time being* instead of *Hereditary*, he might say, as Mr. H. does, but with more Truth, “ That if
 “ the Legislators had design'd to have alter'd
 “ the Constitution, and laid a *new* Obligation
 “ on the Subject never to submit to any but
 “ *Time being Kings*, it had been absolutely
 “ necessary for them [the Parliament] to have
 “ declar'd and enacted, That the Subjects
 “ should ever hereafter swear or pay Allegi-
 “ ance to the King *for the Time being* ; that no
 “ Statutes

“ Statutes for the Time to come should be va-
 “ lid, but such as were made by them. And
 “ that the 11th of *Henry VII.* should be still in
 “ Force; but since nothing of all this was
 “ done by them, it is evident, they had no
 “ Design to do it: For an *Hereditary Consti-*
 “ *tution* is not to be alter’d, the whole Course
 “ of the Common Law to be inverted, and the
 “ Statutes of the Realm repeal’d by Implica-
 “ tion, and that Implication no better than an
 “ ill-grounded Conjecture.

All that Mr. *H.* drives at, if I rightly under-
 stand him, (for his Sense is too often clouded
 with his thick Rhetorick) is this, That because
 there is no positive Law made by any Rightful K.
 in which it is expressly declar’d and enacted, That
 Subjects should never swear or pay Allegiance
 to any but *Hereditary* Kings, therefore Sub-
 jects may and ought to swear and pay Allegiance
 to a King *de facto* in Possession, because they
 have such a Law for them, viz. 11th *Henry*
VII. But by his Favour, what need is there
 of any such Law, when the very Constitution
 of an *Hereditary Monarchy* supposes it? And
 Mr. *H.* calling his *Constitution-Kings*, Kings *de*
facto, proves it. But if this will not do, what
 will he say to his Oracle, Sir *Edward Coke*,
 who says, the *Legiance of the Subject is Legal,*
as well as Natural? And if it be so, I would
 gladly know, how Legiance can be *Legal*, if
 there

there be no Law to make it so; and if there be a Law, why does Mr. H. say, that it never was *declar'd* and *enacted*, &c. To this perhaps he'll say, that Sir *Edward* means it of Kings *de facto*, as well as *de jure*. But this cannot be, for he says, that the Subjects of *England* owe both a *Legal* and *Natural* Allegiance to their Sovereign; but that cannot be true with Relation to an *Usurper*, for no one ever said, that *Natural* Allegiance was due to an *Usurper*; and indeed neither can the *Legal*, for according to Sir *Edward*, they both go together. (See *Calvin's Case*) From whence it evidently follows, That *Allegiance* is due by *Law* to the *Rightful* King, and him *only*, and that if the 11th of *Henry VII.* be not repeal'd, it must, even in the Opinion of Sir *Edward Coke* himself, be interpreted of the *Lawful* King, and him *only*.

A. p. 71. Indeed this Notion of a *Virtual* Repeal seems to proceed upon a double Mistake; *First*, That 1 *Jac. I.* hath made the Crown more Hereditary than it was before; *Secondly*, That the 11th of *Henry VII.* can have no Place in an Hereditary Kingdom, whereas it is certain, the Crown was Hereditary before this Act of Recognition.

B. Doubtless it was so, and in this we are agreed.

A. p. 71. The Act of Recognition supposes it. This Act recognizes King *James I's* Title, as *rightfully, lineally, and lawfully* descended of the Lady *Margaret*.

B. Very right! it does so. And to shew that he was Rightful Heir, the Act does not say, that he was rightfully descended of *Henry VII*; but of *Margaret*, (*mark that*) who was *rightfully* descended from *Eliz.* Daughter of *Edward IV.* and so the Act leaves the Constitution as it found it, in a *rightful, lineal, and lawful Descent* from *Margaret*, who had by her Mother a Right, but not from her Father, who had none, but what he had in his *Wife's Right*.

A. p. 71. Therefore since the Crown was *Hereditary* before the 1st of *James I.* when the Objectors confess the 11th of *Henry VII.* was in force (otherwise they could not say it was then virtually repeal'd) they must also grant, that the 11th of *Henry VII.* may have place in an *Hereditary* Kingdom.

B. Must grant! Suppose the Objectors are fullen and obstinate, and will not grant it, how will he help himself? But tho' Mr. H. says, they *must grant*, yet he is more civil then to say it *must have Place*, he is contented with *it may, &c.* And so *it may*, if we take King *for the Time being* in a large Sense, as *Henry VII's* Parliament certainly did, for a *Rightful*,
as

as well as *de facto* King, for Kings for the *Time-being*, may be either. And what will Mr. H. get by this?

A. p. 71. That it *may*, and actually had Place, is evident from *Henry VII's* Acts.

B. Yes, yes, we grant this too, in the large Sense of the Words.

A. p. 71, 2. After the Crown had been entail'd in the first Year of *Henry VII's* Reign, on the Heirs of his Body, can we believe, that he design'd by this Act of the 11th of his Reign, to break the Succession of his own Children? Undoubtedly he did not.

B. No to be sure, he had been very unnatural if he had. But was there nothing of *Self* in this Act? Undoubtedly there was. *Charity begins at home*, you know. This Act might have Respect to his *Children*, but undoubtedly the main Design of it was to secure himself from any Attempts of the H. of *York*, there being at that time, one *Perkin Warbeck*, set up against him, pretending to be the true *Richard*, Son to *Edward IV.* And perhaps not only so, but to secure himself against his own Flesh and Blood, his Son, who, after his Mother, had an immediate Right to the Crown, for all *Henries* being King for the *Time-being*, and might, being a Prince of a bold and daring Spirit, have made him know, tho' he were his own Father, that the Title of a King for the *Time*
G 2
being

being, could not defeat his better Title of *Inheritance*. And had the Act of *James I.* been then made, he would by that Law, have made him know, That all Acts made, as that of the 11th of his Reign, to disinherit him, were not only *virtually repeal'd*, but *null and void*, being against the Constitution of an *Hereditary Monarchy*.

A. p. 72. Wherefore as the 11th of *Henry VII.* was not design'd to interrupt the Descent of the Crown, but to provide for the Peace of the Community, and Security of the Subject, if the *Hereditary Succession* should happen to be interrupted.

B. As it was by him, *Elizabeth*, the Daughter of *Edward IV.* being the Right Heirefs to the Crown.

A. p. 72. So the 1st of *James I.* which was to secure the *Ancient Succession*, was not design'd, in Case that fail'd, to take away the *Ancient Provision*, which had been made for the Preservation of the Community, and the *Safety* of the Subject.

B. What does Mr. *H.* mean by *Ancient Provision*? The true and only *Ancient Provision* for the Preservation of the Community, and the *Safety* of the Subject, was the securing of the *Ancient Succession*.

A. p. 73. But suppose the States should mistake the next Heir.

B.

B. If they should mistake, I suppose 'twould be a willful one. *may*
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A. p. 73. Or place another in the Throne, or another should thrust himself into it, and they recognize him for King (as the Legislators knew had been often done.)

B. Why, truly, if they had plac'd another, or recogniz'd such a one, unless they had a Law, wherein it was *Declared* and *Enacted*, that such a one was to be King, to all Intents and Purposes, they would have been guilty of the Highest Injustice, and unless Mr. H. will say, That Things that have been done unjustly, and contrary to Law, may be done Lawfully, because forsooth, the Law which was made to prevent, does not say, as Mr. H. would have it, *i. e.* That the Subject shall submit to none but the *next Heir*, or shall not submit to him, that *unjustly possesses the Throne*. When nevertheless it does say all this, tho' not in Mr. H's Words, when it plainly says, *That his Majesty is their ONLY Lawful and Rightful Leige, Lord, and Sovereign*———*Their undoubted Rightful Leige, Sovereign, Lord and King.* App. N^o 15. And if the Parliament in that Act do Agnize *their constant Faith, and Obedience and Loyalty to his Majesty and his Royal Progeny*, then I think, this is as plain, to any one of an ordinary Capacity, as if it had been worded, according to Mr. H's private Senti-
ments,

ments, *viz.* That Allegiance is due only to the Rightful King, and to his next Heir, included in the Word *Posterity*, tho' it does not say in so many Words, That *they shall submit to none but the next Heir. Or shall not submit to him that possesses the Throne.* For 'tis supposed, that all those that did otherwise, went contrary to the true *Hereditary Succession* of the Crown, tho Mr. H. boldly, and without any Legal Proof, asserts the contrary, making Fact to be *Law* and *Constitution*, which is a very wild and extravagant Notion, but Mr. H. is positive.

A. p. 73. Therefore it leaves them to that Course, which has been ever held, thro' all such Revolutions of Government in this Realm. A Course which has been warranted by the Highest Authority in it.

B. This we deny. For tho' the People submitted for *Fear* or *Interest*, or because they could not help themselves, being under an *Ursurping Power*, this did not warrant them to do so. Neither to speak properly was that the Highest, but a *pretensed Authority*, (which is none at all) that forc'd them to a Submission, contrary to their *Natural Allegiance*, and against the Laws of an *Hereditary Monarch*, in which, Allegiance is due *only* to the NEXT HEIR ; notwithstanding it was *Enacted* into a *Statute* under Henry VII. and not yet repeal'd,

peal'd, for that needed not, it being *null* and *void* in it self, being against the truly ancient *Hereditary Constitution of England*.

A. 74. The Lawfulness of submitting to a Prince, whom it was unlawful to set up, may be illustrated and proved from the Conduct of God's own People, *to whom he had given a Law*, Deut. 17. 14. *not to set a Stranger over them*.

But if Mr. H. had read on he would have found *vers. 15*. That they were to *set over them Him whom the Lord their God should choose*. They had nothing to do to set up or pull down Kings. But if God, for their wickedness, sat a Stranger over them, they were bound to submit to him, because it was his doing, as it was in setting the *Babylonians, Grecians, Romans*, to rule over them to chastize them for their Idolatry and Rebellion against him. And when Mr. H. can shew their Case and ours to be the same, we may talk further with him. They together with their Princes submitted to Foreigners and Conquerors; but that is not the Case before us. Mr. H. sets up a King *de facto*, by *Rebellion*, against a *Lawful King*, which is quite another thing. But what the *Jews*, or other Nations did, is not my Business at present to enquire into, for I am resolv'd to make no Remarks, but only upon what relates to the *English Constitution*, and

not follow him in Revolutions that no way concern us, tho' if I should, I am confident I should find them much more favourable to our Point than his. In a Word, Usurpation can never give a Right, tho' back'd with *Prescription*, because a Possessor *malæ fidei* can never prescribe; and this is plain from the 3 *Henry's*, who, tho' they had Prescription of 60 Years, yet the Rightful King with his Parliament declared them all *Usurpers*, *Pretensed Kings*, Kings in *Deed* and not of *Right*, tho' Mr. H. is pleas'd to say, for what Reason I know not, that the Distinction of *de facto* and *de jure* was *misapply'd*, at least to two of them. *Henry V.* and *VI.*

A. p. 74. It is acknowledg'd by some of those, who make this Objection of a *Virtual Repeal*, that notwithstanding the Act of *Recognition*. 1 *James I.* The Succession may be limited by the Legislative Power.

B. What the Legislative Power? *i. e.* The King *de jure*, with the Lords Spiritual and Temporal, and Commons Assembled, in a Free Parliament may do, is not my Business to enquire; tho' Great Lawyers have declared the Acts of Parliament tending to the Disherison of the Crown are of no force. But I must still deny, (tho' Mr. H. says he has proved it) That Kings *for the Time-being* [unless they are also *de jure*] with their two Houses of
Par-

Parliament have the Legislative Power [*de jure*] tho' they may have had it [*de facto*] And I must further add, That they were never acknowledg'd to have it by Kings *de jure* and their Parliaments, tho' they have *allow'd* their Acts to go for Laws, for the Reasons before given, and for those that I shall give you by and by. For they never did, (as Mr. H. himself requires, and says, is *absolutely necessary*, p. 70.) *Declare and Enact*, That Kings *de facto* had the *Legislative Power* in so many Words, and therefore I infer, as Mr. H. does, That since nothing of this Nature was done by them [Kings *de jure* and their Parliaments] it is evident they had no design to do it. It is one thing to let Laws, made by Usurpers, go for Laws, not being against the Crown, and for the Good of the Subject, and another thing to *Say, Declare and Enact*, That all Kings *for the Time being* shall have Power to make Laws, and that those of the King *de facto* shall be as good Laws as those of the King *de jure*. In a Word, if the Laws of Kings *de jure* be good and binding, without any Declaration of the succeeding Kings to confirm them, and the Laws of a King *de facto* are not so, till *confirm'd* and *allow'd* to go for Laws by the King *de jure's* not Revoking, Repealing, or Declaring them Null and Void, or upon Account of the King *de jure's* presum'd Consent ; then
'tis

'tis plain our Law does distinguish, and so no Breach of that Rule, allow'd by all Laws, That *we must not distinguish where the Law makes no Distinction.*

A. p. 78. To conclude, against this imaginary Repeal of the 11th *Henry VII.* by the 1 *James I.* The greatest Lawyers in the Kingdom have declared since the Act of Recognition, That Allegiance is due to the King in Possession, and have supported their Opinions by the 11th of *Henry VII.* and therefore did not believe it Repeal'd.

B. *Several Lawyers have declar'd!* Very good. And have not as good Lawyers declar'd the contrary? Lawyers are but private Men and fallible, and their Opinions are but private Opinions, and so of no Authority, on either Side, My Lord Chief Justice *Bridgman* in his Answer to *Cook*, the Regicides Plea from the 11th of *Henry VII.* owns that the Act was made to preserve the King *de facto*, but then adds immediately, *how much more the King de jure*, which shews his Opinion, that the Act was *now* to be understood, of a King *de jure*, and so is *virtually repeal'd*, as to Mr. H's King *de facto*.

A. p. 79. It hath been said, the Oath of Allegiance enjoin'd in the beginning of King *James I.* Reign was founded on the Act of Recognition, and has ty'd the Subject more strictly

strictly to the next *Heir* than he was ty'd before. But this is a Mistake.

B. But pray, where lies the Mistake?

A. p. 79. Why, the Additions were all of 'em levell'd against some Popish Tenets.

B. Very good! Why then the Intent of the Act, I suppose, was to secure the King from any Subject that should act against him, upon those *Popish Principles*; and if *Protestants* have acted, and 'tis too notorious to be deny'd, that they have acted upon those *Principles*, 'tis no *Mistake* to say, That *that Act* has ty'd Subjects more strictly than before. And the very imposing of that Oath, upon *Protestant*, as well as *Popish* Subjects undeniably shews it.

A. p. 79. As for the Word *Heirs*—it is no Addition.

B. That's true. But however there were some Words added to that Oath, for the greater Security of the *Rightful King* against all sort of Usurpers. *What* (says my Lord Chief Justice *Bridgman* in the Trial of the Regicides, p. 323.) *was that Oath of Allegiance that you took? It was, that you should defend the King his Person, (that is in 3 Jac. Chap. 4. his Crown and Dignity) What was it? Not only against the POPE's Power to depose, but the Words are or OTHERWISE.* And p. 16. he says, *the Oath of Allegiance was to defend the KING and his HEIRS, against all Conspiracies and Attempts*
WHAT-

WHATSOEVER ; against His and Their Persons, their Crowns and Dignities ; NOT ONLY against the POPE's Sentence, as some would pretend, but as OTHERWISE, against all Attempts and Conspiracies, not only against his Person, Crown, and Royal Dignity, nor Pope's Sentence, nor only in order to Profession of Religion, but ABSOLUTELY, or OTHERWISE, that is whatsoever Attempts, by ANY POWER, AUTHORITY, or PRETENCE WHATSOEVER.

A. p. 80. The Account of our Constitution and Laws supported by the Opinions and Authority of some of our modern Lawyers, &c.

*B. I do not think Lawyers, whatever Mr. H. may do, to be the best Casuists. We know but too well, what is Law in one Judge's Time, is not so in another, and I think, that that Lord Chief Justice was in the right, (with Submission to Mr. H. and his Lawyers) that told a Pleader, who quoted a Report for Law, that he valu'd not the Report, and said it was only that Judge's Opinion, and he, sitting in the same Place, and by the same Authority, his Determination was as good Law as his that sat there before him. And Mr. Hobbs in his *Behemoth*, p. 49. says, *As for the Common Law contain'd in Reports, they have no Force but what the King gives them ; besides it were unreasonable,**

sonable, that a corrupt or foolish Judge's unjust Sentence should by any time, how long soever, obtain the Authority and Force of Law. What do Acts of Parliament signifie, if we must be determin'd by Reports, this is in plain English, to make our Laws, as the Papists do the Scriptures, a Nose of Wax.

A. p. 87. Some will be apt to say, that in all this Discourse I have gone no higher than the Constitution and Human Laws; and is this sufficient to satisfy Conscience? Yes, in Matters of Civil Obedience, of which Human Laws are the Measure, so long as there is nothing therein contrary to the Law of God.

B. True. But is it not contrary to the Law of God to break an Oath taken to a Rightful Prince, tho' out of Possession? Is it not contrary to the Law of God to deprive a Prince of his just Right, and then to swear to keep him out of it, and support his Enemy in it? If this be not contrary to the Law of God, and Natural Justice too, I know not what is. *Iustitia est constans & perpetua voluntas suumq; cuiq; tribuendi.* I would advise Mr. H. to read Dr. and Student, and Bishop Sanderson's Cases.

A. p. 88. When our Blessed Saviour was upon Earth, he submitted to the Government under which he liv'd, made no Alterations in Matters of Government, &c.

B.

B. Very true.

A. p. 88. But we are left to learn, from the Laws of our several Countries, who these Magistrates are.

B. True again. And by the *Fundamental Laws of England* we are taught, That our Allegiance is due to him, who has the Right by *Inheritance*.

A. p. 89. Our Constitution, by requiring Allegiance to be paid to the King in *Possession*, is so far from being contrary, that it is agreeable to the Holy Scriptures, as it appears by the Resolution of the Case that was put to our Saviour, whether it was lawful, &c.

B. This Resolution, I think, is nothing to the Case in hand. The *Jews* were under the *Roman* Emperors, and being conquer'd by them, the Emperors were their Governors *de jure*, as well as *de facto*. It is plain, that both *People* and *Princes* of *Judea* had submitted, and given up their *Right* to them, and if there were no other Proof of it than the *Jews* Answer to *Pilate*, when he demanded of them, whether he should crucify their King; they all, with one Consent cry'd out, (*we have no King but Caesar*) that were sufficient, or that Question of the Disciples, *Wilt thou at this time restore the Kingdom to Israel?* The *Jews* had quitted and given up their *Right*, but was this the Case in *England*? When there were always

ways *Claimants*, and such as had the Right of *Inheritance*, and that is a *Divine*, as well as an *Human* and *Constitution Right*.

A. p. 91. Our Saviour doth not resolve the Lawfulness of their Subjection to *Cesar*, into his *Right*, to the Government of *Judaea*, but into his *Possession* of it ; the Coinage of Money, and raising of Taxes, which Our Saviour lays down for a sufficient Ground of their Subjection, being no manner of *Proof* of the former, but an undeniable *Sign* of the latter.

B. If Our Saviour resolv'd the Lawfulness of the *Jews* Subjection to *Cesar*, because he was in *Possession* ; 'tis reasonable to suppose that Our Saviour resolv'd so, because no one had, at that time, a *better Title* ; otherwise Mr. H. must say, Our Saviour requir'd the *Jews* to submit, and pay Taxes to the Prejudice of him, who had a *better Title*, which I believe Mr. H. will not venture to say, for that would be to require them not to pay Tribute, where Tribute *was* due, but where it *was not* due, which would have been the highest Injustice. To bring the Matter home to our selves. If *Possession*, *Coining* of Money, and *demanding* of Taxes and Tribute give a Right, CROMWELL had as good a *Right*, and was as *Lawful* a Governour as any *England* ever had. But this I believe Mr. H. dares not say, for more Reasons than one.

A.

A. p. 96. It is well known that *K. John* was no more than a King in *Possession*—— And yet we see the Homily calls him the Subjects Sovereign Lord the King, and their Natural Lord the King.

B. To this I answer, *first*, That *Richard I.* Declared *John* his Heir, and so being at least *Testamentary Heir*, he had some shew of an *Hereditary Title* ; *Secondly*, The Homilist in that Homily declaring *chiefly*, if not *solely*, against the *Popes Usurpation*, might not be so nice in wording his Discourse, as he would have been in declaring against the Usurpation of one Prince upon another ; his Business and Design being more to beat down the *Pope's Power*, than to *preach up* the King's *Prerogative* and *Title*. Besides, greater Men than our Homilist, even some of the Fathers, and *St. Austin* by name, in heat of opposition to some Tenets of their Adversaries, have let drop some unguarded Expressions, that seem'd not sound and Orthodox. And this may serve to excuse our Homilist, and the rather too, that it is not agreeable to his Sentiments in other Parts of his Homilies, as any unprejudiced Person may see, that will compare them. The Authority of the Homilies is for *Doctrines* and not for *Facts*, and in that Sense they are subscrib'd. There are diverse other Mistakes as to *Facts*. Should some Popular Sermons and
Ha-

Harangues, of the celebrated Preachers of this time, be nicely scann'd, and look'd into, I fear, we should find them far from being Orthodox, and according to the Establish'd Doctrine of the Church of *England*. I could quote many of them, but I forbear. Mr. *H.* should have consider'd further, that the Homilist might, in opposition to *Lewis Dauphin* of *France*, who was a *Foreigner*, and had no Pretence to the Crown of *England*, (but by the Rebellion of the *Barons*) call *John* their *Natural Lord*, &c. and might condemn those Subjects, who broke their Oaths to him, in behalf of a *French-man*.

A. p. 97. Our Laws in this Point are agreeable to the Great End and Design of Government— Our Constitution in this Point has the Suffrage of Reason, as well as Authority. Our Church in the first Homily, &c.

B. Here Mr. *H.* harangues it again, and makes a mighty Noise about nothing. Whoever, that was a Member of the Church of *England*, question'd, That Government was set up by God for the Good of the People, provided that the King's Good were consider'd too. See Bp. *Sanderson*, de oblig. consc. Præl. 10. and D. and Student. And tho' Government were not primarily instituted for the King, yet Care was always taken primarily of him, because he is God's Minister, and by God's

Ordinance and Appointment, attends upon Government for the *Peoples Good*, next to *God's Glory*. And as for *Reason*; Nothing can have the Suffrage of *Reason*, but what is *just*. For, *Sine Justitia nihil est laudabile*. Mr. H. knows who taught us this Lesson, and that Justice *est omnium Domina & Regina Virtutum*. Indeed neither *Law*, nor *Religion*, nor all the *fine Pretences* to them, signifie any thing without *Justice*, which obliges us to suffer all things, rather than do any thing contrary to it, according as the same Philosopher by the Light Nature hath taught us: *Nemo justus esse potest, qui mortem; qui dolorem, qui exilium, qui egestatem timet, aut qui ea quæ his sunt contraria, aequitati anteposit.* I will not put these Words into *English*, lest Mr. H. should think I reflect— *Animamq; in vulnere pono*.

A. p. 98. If Government was instituted for the Sake of all the Members of the Community, then, after they have done what they are able to maintain their Prince, if he happens to be dispossest'd, and cannot afford them any of the Benefits of the Government, can defend neither himself, them, nor his Right to govern them, &c.

B. Hey day! Where are we now? I thought we had been talking all this while of *Rebellious Subjects* deposing of *Rightful Kings*, or keeping *Rightful Heirs* from their Thrones. And here

here Mr. H. talks, if *the Subjects doing all that they are able, to maintain their Prince in the Throne, if he happens to be dispossess'd*. I wonder, who should *dispossess* the King, if all his Subjects, according to their Oaths of Fidelity, stand by him, and how he can *happen*, as Mr. H. words it, to be *dispossess'd*; What, must the King *dispossess* himself? If he does, indeed he may thank himself, the Subjects are innocent. But if they *dispossess* him, they are *Rebels and Traitors*, and if they put up another, he is in plain *English* an *Usurper*, and the Laws of the Land, which forbid Resistance, do not allow, much less require Submission to such a King; unless Mr. H. will say, *Usurpation* is the *English Constitution*.

A. p. 100. The *Jews* liv'd in Subjection to the *Midianites* and *Moabites*.

B. Well! What if they did? What's this to the Purpose? Were the Princes of *Midian* and *Moab* *Jews*? Or did the People of *Israel* depose their natural Princes to set up *Midianitish* and *Moabitish* Princes over them? No such Matter. The *Midianitish* and *Moabitish* Princes rul'd over them as *Conquerors*, not as *Usurpers*; *the Lord*, for their Sins, *deliver'd them into their hands*. But what is all this to *Rebellious Subjects* deposing *Lawful Princes*, and setting up Fellow-Subjects, as Kings to rule over them in their Room? Should any one

else argue at this Rate, Mr. *H.* would have but little Mercy upon him.

A. p. 105. As for the Behaviour of the Primitive Christians after the Revolutions, &c.

B. As for the Behaviour of the Primitive Christians, &c. Mr. *H.* may consult, Bishop *Usher's Power of the Prince*, Dr. *Sherlock's Case of Resistance*, Dr. *Hick's Jovian*, D. *Digg's Unlawfulness of Subjects taking Arms*, and others. My Design was only to clear up our Constitution, and make some Remarks upon Mr. *H.* misrepresenting of it, and that being done, I hope, to Satisfaction——

A. I cannot but say you have said enough to satisfy me, but others perhaps will not be so easily satisfy'd, as I am; therefore I must, now we are together, desire you to speak a little more fully and distinctly to the *Legislature*, because Mr. *H.* seems to lay the greatest Stress upon that Point.

B. With all my Heart; and because, as you say, Mr. *H.* insists so much upon this, and lays so much Weight upon it, (and in truth the whole Cause depends upon it) it seems necessary to consider this Matter distinctly. Besides, what I have said above, I have these following things to offer to his, and any impartial Man's Consideration; And I doubt not, but it will easily appear, how weakly Mr. *H.* reasons, and what a mighty Fabrick he builds upon
on

on sandy Foundations, nay, even upon none at all.

The Sum of the Case is this. The Laws of Kings *de facto* are in force and binding, and are so own'd by the *Judges, Lawyers, Parliaments*, and *Kings* themselves ; and from thence Mr. *H.* draws this Conclusion, That therefore by the Acknowledgments of all these, such Kings have a *Legislative Authority*, and are own'd by the *Laws* and *Constitution* of *equal* Authority and Power with any other Kings, and that, in this Point at least, the *Laws* and *Constitution* make no manner of difference. This is the Sum and Strength of all that he hath said ; and how false this is in every particular, I will shew you fully ;

First, I observe, That there is a Fallacy couch'd in the very Question, and that is, *à benè divisis ad malè composita*. He confounds and jumbles that which ought to be divided and separated, for they are two Questions, Whether *the Person hath Authority?* And whether *the Laws made by that Person have force?* These are of a distinct Consideration, and ought to be handled separately, which he makes one, and concludes without Sense or Reason ; That because their *Laws* are in *Force*, therefore they have a *Legislative Power*, and I can't tell what ? Whereas all Men else, who

understand the Question, (as I perceive Mr. *H.* does not, tho' he has wrote a Book upon it) have drawn a direct contrary Conclusion, That tho' their *Commands* are to be *Obe'y'd*, yet they have no *Authority*, but the Obedience and Force of their Laws ariseth from other Considerations. *Grotius*, *De Jure Belli & Pacis*, l. 1. c. 4. says, expresly, *De Invasore Imperii—Actus Imperii quas exercet vim habere possunt obligandi, non ex ipsius jure, quod nullum est*, and the same says, *Bishop Sanderson*, *Praelect.* 5. *Observandas esse Leges potestatem injusti possidentis, non quasi ullo imperantis jure obligatorias*. This Question hath been handled by many Civilians and Casuists, and there is not one of them, that I ever saw or heard of, but draws a Conclusion in direct Contradiction to that of Mr. *H.* and that is, That the Validity of their Acts and Laws proceeds *aliunde* (as *Lessius* says) from other Things and Grounds, and not at all from any Authority vested in their *Persons*. And I pray Mr. *H.* in Charity to himself, to try if he can find any one Author in all the World, (who understands the Question) to second him, for 'tis a little ridiculous to set up a Rampant Paradox, and talk of it with such Confidence, when the whole Current of Authors, and the Sense of Mankind is directly against him.

Secondly,

Secondly, If there can be any good Reason given, why the *Laws* of such Princes should remain in force, and at the same time the Authority of their *Persons* not acknowledg'd, nay deny'd, then Mr. *H.* Conclusion falls to the ground, and his Book with it; for then 'tis plain, that it does not necessarily follow, That because such *Laws* are in *force* and *being*, therefore *Makers* of such *Laws* are, and are accounted *Legislators*, by those who own and obey their *Laws*. Now there are very many such Reasons, and some have already been mention'd, and I shall not repeat them. Many are found in Authors. And to defeat Mr. *H.*'s Conclusion, one is as good as one Thousand. I shall name but two. The one is drawn from *Nature* and the other from *Policy*. A *Natural* Reason is this, That 'tis unreasonable that the *Innocent* should suffer for the *No-cent*, nay, 'tis unjust and *unrighteous*, and against *Common Equity*. When *Laws* therefore are made, Judgments given, &c. and the whole Body of People involv'd in them, 'tis not equitable and just, upon no other Reason, but because an ill Man set at the Helm, for his Sake, to make the People suffer, to undo all that has been done, and set the whole Nation into Disorder, whereas perhaps most part are *Innocent*. The Second is a *Political* Reason. In every Turn of Government, all wise

Princes (as hinted before) will keep things as quiet as they can, and to let things lie on any Bottom, that they may be secure. 'Tis not safe to unravel things too far, to unhinge the Government to divest them of Laws they have been us'd to, and chose themselves : These things would be apt to breed a Rebellion in a *settled* Government, and much more to break the Neck of a *New Revolution*. These, and several others, as good as these, are plain Reasons why the *Laws* should stand ; but this is nothing at all to their *Persons*, nor to the acknowledging any manner of Authority to be in them.

Thirdly, And this as it hath a Reason in *Nature*, so it hath always been the *Custom* and *Practice* of all Civiliz'd Nations ; That any Person, who sustain'd the Place and Office of Magistrate, tho' *unjustly*, as to his *Person*, yet so long as he sustain'd the *Office*, the Acts perform'd by him, which were according to the *Legal* and *accustom'd* Forms, were always held as valid ; but no Body ever drew such a Consequence as Mr. H. does, That therefore *the Authority was annex'd to their Persons, and they had the same Legal Prerogatives with those that were rightly possess'd of those Places*. For so soon as ever they found that they were wrong Possessors, if they had Power, they always Cashier'd and abrogated *them*, tho' they retain'd

retain'd their *Laws*, but not out of any regard to their *Persons* at all, but to the *Office* which they sustain'd. We have a famous Instance in *Ulpian*, repeated by *Hottoman* in his *Quest. illustr. p. 128*. The Question is, *An quæ à falso magistratu per magistratus nomen gesta sunt, rata esse debeant?* Whether those things, which are acted by a *false* Magistrate in the name of a *true* one, ought to be valid? But no Body ever made it a Question, whether the *Magistrate* himself was valid, for that all Mankind conclude the contrary, except Mr. *H*. And for the Solution of this, He tells us it was an old Question, and brings in an Instance to decide the Case in Law from *Ulpian*. *Barbaricus* being a *Slave*, carry'd himself at *Rome*, as if he had been a *Freeman*. And having insinuated himself into the favour of *Anthony* the *Triumvir*, at length, by his assistance, he obtain'd the *Prætorship*, and was made *Prætor*. But the thing coming to light there were two Questions arose, one was *whether what Barbaricus acted in the Office of Prætor, ought to be held valid?* Or whether they ought to be *Null*, as being done by a Man, who was indeed *no Prætor*. And the reason of that doubt was, because by the *Roman Law* no Person of *Servile* Condition could bear any *Civil Office* in the *Common-Wealth*, nor is their Condition chang'd by gaining *Dignities*

ties and Honours by a Lye. The Solution of this Case is this, *quamvis directo jure acta hæc Barbarii valere non possunt, &c.* Altho' these Acts of Barbarius cannot be valid by direct Law, notwithstanding they ought to be esteem'd valid for the publick Good, that so many Decrees might not be rescinded, and so many Possessions of the Citizens disturb'd: Now this is a general Reason, not appropriate to the Roman Common-Wealth, but being founded in Nature, is common to all Mankind, and all Nations have practiced accordingly, but never any Man before Mr. H. transferr'd the validity of their Acts, to that of their Persons, that is a secret reserv'd for Mr. H. Barbarius was no PRÆTOR, and tho' the Acts of his Prætorship remain'd in force, they never thought that the Acts of his Prætorship, how valid soever, gave any Authority or stamp any Character upon his Person, but the direct contrary, as Evidencies, not of his Authority, but of his Fraud and Usurpations. His Acts were Testimonies of his Guilt, and they were Crimes to him, how valid soever to others, and for which Crimes he suffer'd, and was immediately turn'd out, and lost his Life. And this is the Case of all Men, who wrongfully get into the Office of Magistracy, and the Reasons affect every one of them (*mutatis mutandis*) Their Acts are valid, but without

out any manner of regard to their *Persons*, and 'tis for *other* Peoples sakes, and not for their *own*, The validity of their *Acts* derives none to their *Persons*, and those who own the Force of these *Acts* at the same time charge their *Persons* as highly Criminal, load them with Infamy, and always punish them, if they have them in their Power : And of this there are Instances, in several Ages, Countries, and Nations. That common and trite Distinction is sufficient to shew how wofully Mr. *H.* is mistaken, *Aliud est esse MAGISTRATUM, aliud esse in MAGISTRATU.* But it seems by Mr. *H.* they are all one, both Parts of the Distinction are the same, that is, it is no Distinction at all, and this is the common Effect of Presumption; Men sow one Paradox upon another, and multiply Errors and Sophisms, when they undertake a Cause they have not well examin'd, nor know the Principles upon which it is built. Had Mr. *H.* understood Civil Law, or Casuistical Divinity, he never would, I am sure he never justly could, have made this Assertion, That because the *Laws* of a King *de facto* are in force, therefore the *Person*, or King *de facto* himself, is as *Legal* a King, and as much supported by the *Constitution*, as a King *de jure*. But these are Sciences he seems not well acquainted with, and therefore ought not to talk
so

so dogmatically, and with so much Assurance as he does, at least I think so.

Fourthly, Consider we the Sense of our *English Laws*, whether they conclude as Mr. *H.* does, That because the *Laws* are in *force*, therefore the *Kings* who made such *Laws*, are by them own'd as *Legislators*, and of the same Authority with other *Kings*. Now 'tis impossible to know the *Laws*, if we cannot rest in the Determinations of the Highest Court, the High Court of Parliament : And we have these following Judgments, which put the Case beyond Dispute.

First, The famous Claim of *Richard Duke of York*, where the Lords declar'd, after a full hearing against the *Regnant King*, (as is before said) That *his Title could not be defeated*. This is a direct Contradiction to every thing that Mr. *H.* hath said, That *the Constitution owns such Kings equally with Kings de jure*. 'Tis ridiculous what Mr. *H.* says, That *the Debates were aw'd by the presence of a Victorious Prince* ; for 'tis plain by the whole Debate, they did all that they could for King *Henry*, and made all the Objections they were able, and in a manner forc'd *Richard* to part with his *Right*, *App. N^o 21. §. 72.* during King *Henries* Life, even tho' they themselves own'd the *Right* to be in him, and such

as

as *could not be defeated*, for no Body can imagine, had he such Influence, as Mr. *H.* fancies, and when he had taken so much Pains for the Crown, he would not then have had it, if he could. But 'tis plain, all the Partiality was against him, and they so far favour'd *Henry* by that *Composition*, as to make him a *Rightful King of an Usurper*; *App. N^o 21. §. 55, 56.* and not only so, but left all the Regal Power in his hands, by Vertue whereof *Richard* was afterwards ruin'd, and lost his Life. This is a flaming Instance upon Record against every thing that Mr. *H.* hath said, so full and clear in it self, that it is like the Dukes *Title*, that it *cannot be defeated*; but having mention'd this before, I shall say no more of it, only observe, that a Man must have a pretty hard Forehead, that can offer any thing against it. For if this be not a Demonstration, that the *Constitution* is quite another thing from what Mr. *H.* made it; I despair of ever seeing any thing demonstrated. And if a Solemn and Decisive Judgment in *Parliament* will not tell us what is the Law in that *Case*, 'tis in vain to look after *Law*. And I must tell Mr. *H.* (if he does not know it already) that this very Sentence stands approv'd by all Posterity, and justify'd as a Legal, and true Decision by all the Historians of those Times and ever since.

Secondly,

Secondly, The Law is declar'd in this Case by the Attainders of the Persons of the Kings *de facto*. I confess, Mr. H. says, *he wonders so much Stress should be laid on the Attainders, and that they are not to be drawn into Consequence.* Which is a very fine Business indeed! For if we must lay no Stress upon any thing, nor draw any thing into Consequence, but what Mr. H. pleases, he will easily gain the Cause. But, by his Favour, the Attainders are invincible Arguments against him. For what, I pray, were these Kings attainted for? But for holding the Crown, and administering the Government, having no Title to it, and upon that very Account they are call'd *Traitors*. And I desire Mr. H. with all his Skill, to tell me, how any Man can be a Traytor *against* Law, and at the same time act *according to* Law? For whatever it may be, in his Account, in the Eye of the Law *TRAITORS* and *LEGISLATORS* are not Synonymous. And is it possible for any Man in his Wits to imagine, that the same Man can be a *Legislator* and a *Traytor* at the same time, upon the same Account, and by the same Law? For their Treason was nothing else but holding the Government; that was objected to them, and 'twas that for which they were condemn'd, that is, their very being *Kings* was *Treason*: Which is a Demonstration, that the *Law* knows none of Mr. H's
Kings,

Kings, but as *Traytors* ; for no Man can be *faulty*, and much less a *Traytor*, whose Being and Actions are supported by the *Constitution*. For 'tis a strange *Constitution* indeed, that cannot defend Men at least from *Treason*, who act only according to the *Principles* and *Terms* of the same *Constitution* ! Is it Sense to say the same thing is *Treason* and *Legal* ? That the same Person, and upon the same Reason is a *King* by *Law*, and a *Traytor* against *Law* ; that the same Person is maintain'd by *Law* in his *Possession* and *Power*, and yet the same *Power* and *Possession* to be highly *Criminal*, and the utmost *Violations* of the *Law* ? These Contradictions require some of Mr. H's Skill to reconcile them ; and I think, I may boldly say, that neither He, nor any of his Party can say any thing to them, and speak Sense ; and I am sure what hitherto hath been said, hath neither Reason nor Sense. He tells us of some other Princes who have been attainted, and of the unjust Attainders of some Persons, which is just to as much Purpose as, to say, because there are some *unjust Sentences*, therefore there were never any *just ones*. The single Question here is, Which of these determin'd according to the *Laws* and *Constitution* ? Did ever any Lawyer, or any one else dispute the Validity of *Richard II's* Attainder ? From whence 'tis plain enough, that tho' they own'd his *Laws*, yet for his Person,

son, that he usurp'd the Throne, had no Authority at all, and was a Traytor all the Time he held it. And I must tell Mr. *H.* that those Parliaments did not act by *Force* or *meer Power*, but as *Legal* and competent Judges, and gave Sentence according to *Law*, even as King *Charles II's* Parliament declar'd *CROMWELL* and his Accomplices *TRAYTORS*. And it would doubtless be a very choice Reason to evade the Force of that Parliaments Sentence, to say that there had been before unjust Attainders.

Thirdly, Whenever the Laws have Occasion to mention these Kings *de facto*, they do it in such Terms and Expressions, as sufficiently declare the Sense the *Laws* have of 'em. And for Mr. *H's* Satisfaction I will draw out some of them, (*App. N^o 1. and N^o 2c.*) In *1 Edward IV.* Concerning the three *Henries*, *IV. V. VI.* who you know were once Three of Mr. *H's* *Constitution* Kings, and as good Kings *by Law* as any others, if you'll take his Word for it. And yet if a Man reads that Statute, he will go near to find a clear contrary Character. As first of all, they say, they are Kings *in Deed*, and not *of Right*, which is an Expression sufficient to acquaint us what Sense the Laws have of such *Les Roys*. But they are more express, and call them *pretensed Kings*, and their Reigns *pretensed Reigns*, and as oft as they speak

speak of them, this is the *Appellation*, the *Stile* and *Title* by which they are dignify'd and distinguish'd. I believe they are called *Pretens'd Kings* neer 50 times in that one Act of Parliament. Now a Man would imagine, that this was not the *Stile* and *Character* of *our Sovereign Lord the King*, and especially in an Act Parliament, where every thing is always nicely and cautiously express'd. Can any Body believe that these Persons, whom the Law calls *Pretens'd Kings*, and their *Reigns Pretended Reigns*, that the Law makes no difference between them, and other *Rightful Kings*, but that they have the same Authority, Privileges, and Prerogatives with the most *Rightful Kings* in the World? I say again, Can any Body believe this, and yet keep himself in his Wits? But this Act goes yet further, and in reckoning up and confirming several Grants and Licenses, Privileges and Advantages, &c. it does it in these Words (which are repeated near 20 times in the same Act) That *they shall be of the same Value and Effect, as if the same were made or granted by any King LAW-FULLT REIGNING in this Realm of England, and obtaining the Crown of the same by JUST TITLE*. These are Words plain enough of all Conscience, and do as plainly shew the difference the Law makes between
 I Kings

Kings *de facto* and Kings *de jure*, even as to the validity of their Grants. And it is unaccountable Mr. H. can read this and assert the contrary. He says, indeed, that the Distinction of Kings in *Deed* and of *Right* in this Statute was *misapply'd*. But that's a special Reason to defeat an Act of Parliament; at this rate they may all be quickly turn'd to wast Paper; 'tis but saying the Matter they declar'd was *misapply'd*, and there's an end of 'em; as if the Parliament did not know their own Minds, or did not know how to express their Meaning, or could not tell what was the *Law* in that Case, or what the *Title* and *Authority* of these Persons were they condemn'd; in the mean time, if the distinction was *misapply'd*, why then those three Kings were Kings *de jure*, and so Mr. H. answers himself; for then all his Arguments drawn from these Kings, and from the force of their Laws, is nothing at all to his Purpose. However, if it was granted him that this was *misapply'd*, this Doctrine is not only contain'd in this Statute, but in several others; as for Instance, 17 *Edward IV. cap. 7.* after King *Edward* fled the Realm, and King *Henry* re-assum'd the Throne, and call'd a Parliament, The Parliament give their Sense of that Re-assumption in these Words, *Whereas——In a*
PRETENDED PARLIAMENT Unlawfully,
and

and by *USURP'D Power*, summon'd by the *REBEL and Enemy of our Sovereign Lord the King, Hen. VI. late in DEED*, but not of *RIGHT King*, and in a few Lines after, in the 29th Year of the *Inchoation of his PRE-TENDED Reign*, and the first Year of the *Readeption of his USURP'D Power and Estate*. We see here how coarsely the Parliament treats *Mr. H's Constitution-King*. *Rebellion and Usurpation* are wonderful Ensigns of *Majesty*! It would puzzle a Man of ordinary Understanding, how a Man can be a *Rebel* and a *Legal King* at the same time, nay, how he should be a *Rebel* for the same Reason that he is a *Legal King*, that is, for *assuming the Crown*, for that is the *Rebellion and Usurpation*, and that only that the Parliament charges *King Henry* with. It may be *Mr. H.* who hath got such a *View of the Constitution*, as never any had before, can tell how to reconcile this, and make Sense of it; in the mean time, it is plain, the Parliament were of one Opinion, and he of another; but I hope he will give us leave to follow the Judgment of *Parliament*, as to Matters of *Law*, and the *English Constitution*, before His, or any *New Constitution-Maker* whatsoever. And the same we have again in the Parliaments of *Henry VII.* where *Mr. H's King Richard* is called plainly *Richard, late Duke of Gloucester*,

USURPER of this Realm ; and again, the *said late Duke* ; and again, *Richard, late PRE-TENDING him to be King* (1 H. 7. c. 6. 10.) And now to conclude this Point. If plain and intelligible Expressions determin'd to a plain and certain Sense in Acts of Parliament, be not sufficient to acquaint us what Notions the Law has of the *Persons* of Mr. H's Kings *de facto*, it is in vain to seek for either Law or Sense. We must range our selves in the Field, and converse with *Brutes*, if the meaning of Men and Laws cannot be understood by the plainest Expressions.

I say again of their *Persons*, for that is the only Question ; Mr. H. indeed talks of their *Laws*, but that is another Question, and of a distinct Nature and Consideration. And a Man would imagine, that if he was to inquire what Account the Law makes of such or such a Person ; his first immediate and proper Inquiry is, what is directly said of *him*, how he is represented, and what Characters the Law gives of him ; and not to run about the Wood, and enquire what *Acts* have flow'd from him, and what Consideration the Law hath of these *Acts*. And in this Case the Law and Law-givers are all express and plain ; and tho' they have retain'd their *Laws*, for *Reasons of State*, and upon just and equitable

Conside-

Considerations, as I have observ'd ; and this is common to all Nations, as well as ours, whose Laws are not Arbitrary, but made and agreed on in *Councils* ; but for their *Persons*, and what Account they had of them, and what Figure they made in the Government, they tell us as plainly and expressly as 'tis possible for Words to do , That these are *pretended Kings*, their Reigns *pretended Reigns* ; that they are *Traitors*, *Usurpers* and *Rebels*. Now if these Expressions by Interpretation mean *Kings* and *Legislators*, why then we must get a *New Grammar* as well as *New Law*, a *New Language*, as well as a *New Constitution*.

Fifthly, We have a late Instance in our Memories, that will set all this Reasoning of Mr. H. in a clear Light. CROMWELL in the time of his *Protectorship* enter'd into a Treaty, and made a League with *France* against *Spain*, and, by Virtue of which Treaty, *Dunkirk*, after it was taken, was deliver'd into the hands of CROMWELL, and kept by him ; and when King *Charles II.* return'd he receiv'd, possess'd, and kept it, by Virtue of the same League and Treaty. Now by Mr. H's way of Arguing, CROMWELL was the true King and Sovereign of *England*, and King *Charles* himself acknowledg'd it, because he own'd that Treaty to be valid, and he him-

self took the Advantage of it. 'Tis to no Purpose to say here, that Mr. H. speaks only of *Laws*. For to make *War* and *Peace*, to enter into *Leagues* and *Treaties*, with Foreign Kings and States, is as proper and peculiar to the Sovereign Power (and especially in *England*) as to make *Laws*; the Facts indeed are different, but the Reason and Argument is the same to all Intents and Purposes. And if these *Treaties* continu'd good and valid to the Benefit of the Nation, although the *Person*, who made these *Treaties* had no Authority at all, nor ever was acknowledg'd to have any, and much less by King *Charles*, why is not the same to be said as to *Laws*; if the validity of those *Treaties* were not Testimonies, nor the least Proof of any Sovereign Power lodg'd in the *Person* of him that made them? The *Validity* of *Laws* are no Proof (purely of themselves) of the *Legislative Power* of them that made them. And the Reason of both these is the same, because the one is no less an Act of *Sovereignty* than the other. The Authority of making *Laws*, and the Authority of making *Leagues* and *Treaties*, *Peace* and *War*, have the same Original, spring from the same Fountain, and are equally Branches of the same Sovereign Power; and let Mr. H. shew the
 the

the contrary at his leisure ; and till he does, this Instance will stand invincibly against him. And the Consequence is as clear as the Day, That as no *Contracts* and *Leagues*, howsoever binding, do either make or prove, that That Person who made them was the *Rightful* Sovereign of the Nation ; so no *Laws*, how binding soever, do either make, or prove, that That Person, who made them, or in whose Name they were made, is the *Legal* King, or *Legislator*, by the *Constitution*.

A. Sir, I give you my thanks for these *Remarks*. And now, I think, you may venture to say, with some Assurance (as Mr. H. does of *his Constitution*) “ That there is no Coun-
 “ try in the World where the Laws have ta-
 “ ken more care to secure the Lawful Prince
 “ in his Throne, or do more expressly disallow
 “ and condemn *Usurpation*, or require Sub-
 “ jects to submit [*and pay Allegiance, which I*
 “ *take to be something more than bare Submis-*
 “ *sion*] to the *Rightful* Prince, or King *de jure*,
 “ than our *own* ; and tho’ perhaps no Country
 “ has had more Revolutions of Government
 “ than *ours*, yet they were not owing to the want
 “ of *Laws*, but because some Men would not
 “ consider and submit to the Rule, *viz.*
Neminem oportet esse sapientiores Legibus.

And now, Sir, I have only one thing more to beg of you, and that is, that you would say something more of the *Non-jurors* ; I desire it the rather, because Mr. *H.* is so positive that there were no *Non-jurors*. His Words are these, *page 2. I don't know there are any Non-jurors to be found in all these Reigns.*

B. Mr. *H.* may be as positive as he pleases ; 'tis his Way, and he can't help it. But I think, I have said enough in my *Remarks*, to prove that there were *Non-jurors*, in some at least of those Reigns, and that the Subjects did not so *universally*, as he says, take *Oaths of Allegiance* to his Kings *de facto* ; and therefore I hope, you will excuse me the Trouble of saying any thing more on that Head. However, to gratify you, I will draw up some few *Queries*, which may serve to clear and illustrate what I have said in the *Remarks*, and leave you to consider of 'em, and Mr. *H.* to answer them, if you think fit to communicate them to him.

Q U E R I E S.

Q U E R I E S.

WHether a Woman eloping from her Husband *de jure*, and cohabiting with another Man, or Husband *de facto*, and performing all the Duties of a Wife towards him, ought not to be reckon'd an Adulteress?

Whether the same Woman, *leaving* or *revolting*, as Mr. H. speaks, from the Husband *de facto*, and returning to her Husband *de jure*, (being penitent for her Adultery, and pardon'd by her Husband *de jure*) ought not to be reckon'd as a true and lawful Wife, notwithstanding her former Elopement?

Whether a *Christian* renouncing his Christianity, and turning *Mahometan* or *Deist*, is not to be reckon'd an Apostate?

Whether the same Person renouncing his Apostacy, and embracing again the Christian Faith, (being truly penitent, and receiv'd again into the Communion of the Christian Church by his Bishop) ought not to be reckon'd a good Christian?

Whether, by Parity of Reason, a Subject to a King *de jure* breaking his Oath to him, and swearing Allegiance to a King *de facto*, (repenting of his new Oath, and revolting from the King *de facto*, *i. e.* returning to his Duty of

of Allegiance to his lawful Prince) ought not upon his Repentance, and the King's Pardon, to be reckon'd as good and true a Subject, as any of those who never swore to the King *de facto*, and to be look'd on as a *Non-juror*?

Whether those *English* and *Saxon* Noblemen, and others, who withdrew into *Scotland*, and settled there, upon *William* the Conqueror's taking the Crown of *England*, were not to be reckon'd as *Non-jurors*? *Fox, Part I. p. 221. Hoveden. Huntindon.*

Whether *Frederick* Abbot of *St. Albans &c.* (who under Sureties went to *Duke William*, and being demanded wherefore he alone did offer Opposition against him, with a confident Countenance return'd Answer, That he had done no more, than in *Conscience* and by *Nature* he was bound to do, and that if the Residue of the *Clergy* had born the like Mind, he should never have pierc'd the Land so far) was not to be reckon'd as a *Non-juror*? *Hayward's Life, Will. I. p. 47.*

Whether those who took part with *Robert* Duke of *Normandy* against *Henry I.* were not to reckon'd as *Non-jurors*?

Whether those who by Letters solicited *Robert* Duke of *Normandy* to invade the Kingdom in *Henry I's* Time, were not to be reckon'd as *Non-jurors*? *Id. Life of Henry I. p. 247.*

Whe-

Whether *David* King of the *Scots*, who refus'd to do Homage to King *Stephen*, because he was sworn to *Maud* the Empress, was not to be reckon'd as a *Non-juror*? *Fox, Part I. p. 260.*

Whether *Henry* the Eldest Son to K. *David*, who did Homage to King *Stephen*, but after repenting thereof, enter'd into *Northumberland*, &c. was not to be reckon'd as a *Non-juror*? *Id. ibid.*

Whether King *David*, who swore that he would destroy *Nabal* and his Family, but repented and did it not, was not to be highly commended? *1 Sam. 25.*

Whether King *Herod*, who swore unto *Herodias*, that he would behead *John* the Baptist, and perform'd it, was not justly to be blam'd? *Mark 6.*

Whether *Robert* Earl of *Gloucester*, who sent *Stephen* a solemn Defiance from *Normandy*, revok'd his Homage, and renounc'd him in Form, was not to be reckon'd as a *Non-juror*? *Vide App. N^o 21. §. 33, 34, 35, &c.*

Whether the same *Robert*, (tho' for a Time he deserted his Sister the Empress, and did Homage to K. *Stephen*, yet) when K. *Stephen's* Queen treated him honourably, tempted him high, and offer'd to make him first Minister of State, if he would disengage himself from the
Em-

Empress, generously reply'd, " That he was
 " not free, but under the Jurisdiction of an-
 " other, and being ty'd with such great En-
 " gagements of Duty, that he was in no Con-
 " dition to receive Proposals of that Nature,
 (as *Malmsb. Hist. Nov. l. 2. p. 107. 209.* re-
 lates it) was not to be reckon'd a *Non-juror*?
 See *App. N^o 21. §. 34. 35.*

Whether those few, whose reluctant Con-
 sciences remonstrated against Compliance with
 King *Stephen*, and whose high Loyalty to
Maud, interpreted *Passiveness* under an *Usurper*,
 to be *Activity* against the *Right Heir*, quitting
 their Lands in *England* to the Tempest of
 Times, and secretly conveyings themselves
 with the most Incorporeal of their Estates, (as
 occupying the least Room in their Wastage over
 into *Normandy*) were not to be reckon'd as
Non-jurors? *Fuller's Eccl. Hist. p. 27.*

Whether those who adher'd to Prince *Arthur*
 against King *John*, and left the Kingdom there-
 upon, were not to be reckon'd as *Non-jurors*?
Fox, Part I. p. 324.

Whether, when the Barons had taken an Oath
 of Allegiance to *Lewis* Dauphin of *France*,
John, or *Lewis*, was King in *Possession*? Or,
 whether there were two Kings in *Possession*,
 and *de facto* at the same time? And if two, to
 which of 'em was Allegiance due? And against
 which

which of 'em might Treason be committed ?
Who were the *Non-jurors* ?

Whether *John de Curci*, who would not do Homage to King *John*, and charg'd him with the Death of Prince *Arthur*, was not to be reckon'd as a *Non-juror* ? *Cambd. Brit. p. 797.*

Whether *Scroop* Archbishop of *York*, *Merks* Bishop of *Carlisle*, and their Adherents, declaring for K. *Richard II.* against *Henry IV.* (supposing they had taken an Oath to *Henry*, and repenting thereof) were not to be reckon'd as *Penitents* and *Non-jurors*, rather than *Revolters* ?

Whether *Owen Glendoure*, who, with his brave, true, and valiant *Britains*, endeavour'd to dethrone *Henry IV.* the Usurper of *Richard II.*'s Crown, was not to be reckon'd as a *Non-juror* ?

Whether those Four, who consented not to *Henry IV.*'s being made King, were not to be reckon'd as *Non-jurors* ? *Stow. H. 4. p. 332.*

Whether those Loyal Gentlemen in the late *rebellious Times*, who refus'd the *Ingagement*, and those Gentlemen, and others, who were wheedled or frighted into Compliance with the then *usurp'd Powers*, but afterwards repented and adher'd firmly to the Interest of K. *Charles II. out of Possession*, were not to be reckon'd as *Non-jurors* ?

Whether

Whether the *PRETENDER*, had he landed in *Scotland*, and been own'd for King *de facto*, Allegiance, according to Mr. *H*'s Doctrine, was not due to him, and him *only*, as being in Possession of that Crown and Kingdom?

Whether Mr. *H*. himself, while he was a *Non-juror*, *bonæ fidei*, did not look upon *Penitents* as *Non-jurors*?

Whether Mr. *H*. can with a safe Conscience absolve a Subject, who has (as by Law requir'd) taken an Oath to a King *de jure*, and his *Heirs* and *Successors*, and notwithstanding this, takes the like Oath to a King *de facto*, and justifies his so doing? I desire, I say, to be satisfy'd, whether Mr. *H*. can, with a safe Conscience, give such a one Absolution?



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